# ONTARIO
# LABOUR RELATIONS BOARD
# REPORTS

## November/December 2010

Ontario

# ONTARIO LABOUR RELATIONS BOARD

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# ONTARIO
# LABOUR RELATIONS BOARD
# REPORTS

**A Bimonthly Series of Decisions from the**
**Ontario Labour Relations Board**

**Cited [2010] OLRB REP. NOVEMBER/DECEMBER**

**EDITORS: VOY STELMASZYNSKI**
**LEONARD MARVY**

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Accreditation – Construction Industry – Employer – Practice and Procedure – Section 136 of the Act requires the Board to find a "double majority" – The "employer majority" is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule "E" list – The "employee majority" is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application – The applicant Association filed evidence that it represented 11 of 38 employers on the Preliminary Schedule "E" List – The applicant, responding party union and intervening union all supported the position that where an employer does not make an Employer Filing, it must be removed from Schedule "E" – The Board however found that the lack of an Employer Filing was insufficient to remove an employer from Schedule "E" – The Board noted that no party had suggested that the 27 employers should be removed from Schedule "E" because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date – Finally, the Board found that nothing in its Rules or in the warning to employers that if they do not make an Employer Filing they may be deemed to accept all of the facts in the Application, relieves the applicant from establishing the statutory prerequisites required – Since the applicant filed evidence of representation for 11 employers and the Final Schedule "E" was composed of 38, the applicant failed to establish the "employer majority" set out in s. 136(2)(a) – Application dismissed

THE UTILITY CONTRACTORS ASSOCIATION OF ONTARIO INCORPORATED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 183, 247, 493, ET AL; RE SEWER AND WATERMAIN, CURB, GUTTER AND SIDEWALK CONTRACTORS' SECTION OF THE LONDON AND DISTRICT CONSTRUCTION ASSOCIATION; UNIVERSAL WORKERS UNION, LABOURERS', 183, 625, 1059 AND 1089.......................................................................... 994

Alteration of Jurisdiction – Construction Industry – Intervenor – Practice and Procedure – Standing – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA ........................................................................ 751

Bargaining Rights – Abandonment – Construction Industry – Delay – Related Employer – Sale of Business – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

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Bargaining Rights – Certification – Construction Industry – The Painters applied to certify employees of the respondent pursuant to s.128.1 of the Act – The Respondent and Intervenor sought to have the application dismissed because on the application filing date the Painters still held bargaining rights for the unit of employees – The unit was the subject of a termination application filed during the open period – The ballots in the termination were counted on the date of filing of the application for certification, and the Painters lost the vote – By decision one week later, the Painters' bargaining rights were terminated – The next day, the Board dealt with the instant application for certification, finding that it was appropriate to exercise its discretion pursuant to s. 111(3)(b) of the Act and finding that the application for certification was timely – Certificates were issued – LIUNA subsequently sought reconsideration and intervenor status in the matter – The Board found that LIUNA had the right to intervene, reconsidered its decision and revoked the certificates – The issue before the Board was whether the Painters' application should be dismissed because they still held bargaining rights on the date of application for certification – The Board found that the Painters filed a valid application for certification in the context of knowing that they were shortly to have their bargaining rights terminated, and that the application was properly treated under s. 111(3)(b) of the Act – Matter continues

BIGGS & NARCISO CONSTRUCTION SERVICES INC; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891; RE LIUNA, LOCAL 1059, TIM SCOTT........................................................................ 727

Bargaining Rights – Trade Union – Union Successor Rights – Unfair Labour Practice – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of "constitutional continuity" – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues

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BIGGS & NARCISO CONSTRUCTION SERVICES INC; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891; RE LIUNA, LOCAL 1059, TIM SCOTT ........................................................................ 727

Certification – Construction Industry – Employer – Unfair Labour Practice – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed

MIMICO GROUP INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ........................................................................................ 760

Certification – Construction Industry – Practice and Procedure – Status – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver "detailed statement of facts" supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to relieve against the application of the bulletin – Matter continues

BURNHAMTHORPE ROOFING CO. LTD. (1994); RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51 ...................................... 733

Certification – Employer Support – Unfair Labour Practice – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 ........................................................................................................ 850

Certification – Interim Order – ETFO applied to represent a bargaining unit of designated early childhood educators – CUPE intervened in the application, asserting that it represented the DECEs in an all employee unit covered by a subsisting collective agreement – The status of the DECEs was the subject of an on-going grievance between CUPE and the school board in which the arbitrator had denied ETFO status to intervene – The issue for the Board was whether it should determine if the employees affected by the application for certification are covered by a collective agreement, or if an arbitrator should make that decision – ETFO asked for an interim order that would have the Board ask CUPE and the school board to adjourn their grievance pending the outcome of the application for certification – The Board held that its jurisdiction to determine the issue was parallel to the arbitrator's, with neither being superior to the other; the Board is not bound by any arbitration award – A proceeding before the Board best protects the natural justice rights of all the parties, including the employees, so the Board chose not to defer to arbitration – Interim ordered dismissed; matter continues

DISTRICT SCHOOL BOARD OF NIAGARA; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE CUPE.......................................................................... 743

Certification – Practice And Procedure – Representation Vote – In this application for certification, an issue arose regarding whether or not the failure to segregate ballots should cause the Board to exercise its discretion to order a second vote – The applicant failed to provide its scrutineer with a list of challenges at the vote; consequently, the voters' list used did not note the applicant's challenges – The applicant subsequently signed off certifying that the balloting was conducted fairly – At the Regional Certification Meeting, the parties agreed on the status of five individuals whose names appeared on the applicant's list of challenges, but whose ballots had not been segregated; the parties agreed that three of those individuals were not employees in the bargaining unit – The vote was counted at 83 against the applicant and 81 for, meaning the three ballots of the non-employees could be determinative of the application – Second vote ordered

ROYAL VICTORIA HOSPITAL; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA ..........................................................................................

Collective Agreement – Conciliation – Reference – The Minister sought advice on whether he could appoint a conciliation officer pursuant to s. 18(2) – The evidence established that prior to the termination of the collective agreement (which had an automatic renewal clause) the union representative left voicemail messages advising that they wished to set dates for bargaining and that their only demand was to increase wage rates to a specific amount; and that the employer representative called the union representative back and spoke with him, at which time he reiterated the demand for wage rate increase – As neither party had given written notice to bargain, the critical question was whether the parties had "met and bargained" – The Board, following *Danver Ambulance*, found that the words "met and bargained" did not necessarily mean a face-to-face meeting provided that a person authorized to bargain for one party makes a clear offer on one or more issues to be negotiated to a person authorized to bargain for another party – The Board also noted that given the advancement in technology since *Danver* was written, its reasoning is that much more persuasive today – The Board found that the conditions for the application of s. 18(2) were present – Advice given

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18.......................................................................... 739

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CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18.......................................................................... 739

Conflict of Interest – Duty of Fair Representation – The applicant claimed that the trade union had breached its duty of fair representation when it refused to pursue her termination grievance to arbitration – Previous to the applicant's discharge, the Local had filed suit against the applicant for defamation in an unrelated incident – The applicant was granted representation by the National union and a favourable legal opinion was prepared – The Local union representative intervened and fresh evidence was acquired which was not shared with the author of the previous legal opinion; instead it was given to a new author and an unfavourable opinion was produced – All parties were able to address the membership at the grievance arbitration vote but no mention was made by the local rep of the contradictory legal opinion; a vote of the membership was held and it was decided that arbitration was not appropriate given the circumstances – The Board held that there was a conflict of interest between the applicant and the Local union due to the pending

law suit and that the Local union had breached their duty of fair representation when there was no mention by the Local union of the legal opinion favourable to the applicant nor were any actions taken to distinguish the two opinions at the membership vote – Application allowed; Board ordered the grievance to arbitration

SHERYL ANNE TOOP; RE CANADIAN UNION OF PUBLIC EMPLOYEES AND CUPE LOCAL 1974........................................................................................................ 818

Construction Industry – Abandonment – Bargaining Rights – Delay – Related Employer – Sale of Business – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

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Construction Industry – Certification – Employer – Unfair Labour Practice – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed

MIMICO GROUP INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ........................................................................................ 760

Construction Industry – Certification – Practice and Procedure – Status – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver "detailed statement of facts" supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to relieve against the application of the bulletin – Matter continues

BURNHAMTHORPE ROOFING CO. LTD. (1994); RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51 ....................................... 733

Construction Industry – Jurisdictional Dispute – Work in this dispute consisted of carpentry portions of concrete forming work for footings, retaining walls and planter boxes located outside of the building structure at the North Bay Regional Health Centre Project – The general contractor on the project, PCL was bound to both the Carpenters' and the Labourers' ICI agreements – PCL subcontracted certain concrete forming work to Downsview, which was not bound to the Carpenters' ICI agreement – Downsview assigned the concrete forming work to the Labourers – The Carpenters filed a grievance against PCL for violating the subcontracting clause of the ICI agreement – In response, the Labourers filed a jurisdictional dispute – A primary issue was whether the work in dispute fell within the ICI sector or in the roads sector of the construction industry – Considering the usual factors in sector disputes, the Board found that the work in dispute was work that fell within the ICI sector – The Board then proceeded to determine the merits of the jurisdictional dispute and found that the work in dispute ought to have been assigned to the Carpenters rather than to the Labourers – It was ICI work and the Carpenters had a collective agreement covering the work in dispute while the Labourers did not – The area practice evidence favoured the assignment of the work to the Carpenters – The employer practice evidence filed by the Labourers, PCL and Downsview was not persuasive and the economic and efficiency evidence favouring the Labourers was not sufficient enough to dislodge the significance of the collective agreement obligations owed to the Carpenters – Application allowed

PCL CONSTRUCTORS CANADA INC., THE DOWNSVIEW GROUP, GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, LOCAL 2486, AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; LIUNA, LOCAL 493 AND UNIVERSAL WORKERS' UNION, LIUNA, LOCAL 183 ........................................................................ 771

Construction Industry Grievance – Delay – Judicial Review – The Sheet Metal Workers and the IBEW sought judicial review of two Board decisions which found that a 1965 Working Agreement signed by Ellis Don did not confer bargaining rights on the unions and was not a recognition agreement – The IBEW also sought to challenge one of the Board decisions for delay – The Court found the Board's decision-making process in each case was transparent, intelligible and justifiable – On the issue of the two-year delay in issuing a decision, the Court held that the union failed to show any prejudice, and was unable to rebut the presumption of regularity of the Board's proceedings – Applications dismissed

ELLIS-DON LIMITED, ELLIS DON CORPORATION AND OLRB; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE .................................. 1016

Construction Industry Grievance – Judicial Review – The union sought review of the Board's interpretation of the term "working conditions" in the collective agreement – The Board found that the employer's requirement that workers wear metatarsal safety boots were an enhanced safety policy and not an "exceptional" working condition – The Court held that the Board's contextual approach to its interpretation of the collective agreement was reasonable – Application dismissed

AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC. AND OLRB; RE IBEW LOCAL 105 ........................................................................ 1010

Delay – Abandonment – Bargaining Rights – Construction Industry – Related Employer – Sale of Business – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

SOMERVILLE CONSTRUCTION ET AL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ........... 839

Delay – Construction Industry Grievance – Judicial Review – The Sheet Metal Workers and the IBEW sought judicial review of two Board decisions which found that a 1965 Working Agreement signed by Ellis Don did not confer bargaining rights on the unions and was not a recognition agreement – The IBEW also sought to challenge one of the Board decisions for delay – The Court found the Board's decision-making process in each case was transparent, intelligible and justifiable – On the issue of the two-year delay in issuing a decision, the Court held that the union failed to show any prejudice, and was unable to rebut the presumption of regularity of the Board's proceedings – Applications dismissed

ELLIS-DON LIMITED, ELLIS DON CORPORATION AND OLRB; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE ................................. 1016

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The employer terminated an inside organizer for soliciting employees during working hours – The union brought an application for interim reinstatement – The employer maintained the reason underlying the discharge of the employee was the fact of solicitation during working hours (and the previous warning given) and not the subject matter of the solicitation (to join the union) – Given the lack of a no-solicitation policy upon which it could rely and the employer's apparent tolerance shown for other discussions during working time, the Board found it appeared unlikely that the inside organizer would have been terminated had he been soliciting for any other cause – It therefore appeared to the Board that the termination was the result not simply of soliciting during working hours, but at least in part because he was a known and active organizer on behalf of the union – The four criteria under s. 98(2) having been met, the Board ordered interim reinstatement – Interim Relief granted

SOBEYS INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A ................................................................................................. 825

Duty of Fair Representation – Conflict of Interest – The applicant claimed that the trade union had breached its duty of fair representation when it refused to pursue her termination grievance to arbitration – Previous to the applicant's discharge, the Local had filed suit against the applicant for defamation in an unrelated incident – The applicant was granted representation by the National union and a favourable legal opinion was prepared – The Local union representative intervened and fresh evidence was acquired which was not shared with the author of the previous legal opinion; instead it was given to a new author and an unfavourable opinion was produced – All parties were able to address the membership at the grievance arbitration vote but no mention was made by the local rep of the contradictory legal opinion; a vote of the membership was held and it was decided that arbitration was not appropriate given the circumstances – The Board held that there was a conflict of interest between the applicant and the Local union due to the pending law suit and that the Local union had breached their duty of fair representation when there was no mention by the Local union of the legal opinion favourable to the applicant nor were any actions taken to distinguish the two opinions at the membership vote – Application allowed; Board ordered the grievance to arbitration

SHERYL ANNE TOOP; RE CANADIAN UNION OF PUBLIC EMPLOYEES AND CUPE LOCAL 1974 .......... 818

Employer – Accreditation – Construction Industry – Practice and Procedure – Section 136 of the Act requires the Board to find a "double majority" – The "employer majority" is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule "E" list – The "employee majority" is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application – The applicant Association filed evidence that it represented 11 of 38 employers on the Preliminary Schedule "E" List – The applicant, responding party union and intervening union all supported the position that where an employer does not make an Employer Filing, it must be removed from Schedule "E" – The Board however found that the lack of an Employer Filing was insufficient to remove an employer from Schedule "E" – The Board noted that no party had suggested that the 27 employers should be removed from Schedule "E" because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date – Finally, the Board found that nothing in its Rules or in the warning to employers that if they do not make an Employer Filing they may be deemed to accept all of the facts in the Application, relieves the applicant from establishing the statutory prerequisites required – Since the applicant filed evidence of representation for 11 employers and the Final Schedule "E" was composed of 38, the applicant failed to establish the "employer majority" set out in s. 136(2)(a) – Application dismissed

THE UTILITY CONTRACTORS ASSOCIATION OF ONTARIO INCORPORATED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 183, 247, 493, ET AL; RE SEWER AND WATERMAIN, CURB, GUTTER AND SIDEWALK CONTRACTORS' SECTION OF THE LONDON AND DISTRICT CONSTRUCTION ASSOCIATION; UNIVERSAL WORKERS UNION, LABOURERS', 183, 625, 1059 AND 1089 .......... 994

Employer – Certification – Construction Industry – Unfair Labour Practice – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed

MIMICO GROUP INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 .......... 760

Employer Support – Certification – Unfair Labour Practice – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made

contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 .......... 850

Employer Support – Certification – Unfair Labour Practice – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 .......... 850

Employment Standards – The Board considered the criteria for establishing wilful misconduct that would disentitle an employ from receiving termination and severance pay – The applicant employee sought review of an ESO's refusal to award him payment, having found that the employee's incarceration was a product of his own misconduct – The employee argued he was absent against his will, and his circumstances prevented him from being able to call-in his absence, a violation of an explicit company rule – The Board rejected the suggestion articulated in the Ministry of Labour's policy manual that the mere failure to follow a company rule was sufficient to deprive the employee of his or her entitlements under the ESA: the failure must be the result of an intentional action, conscious, deliberate and defiant of the employer's authority – Equally, the employment relationship was not frustrated because the employee's failure to comply with the rule did not seriously interfere with his job duties, and neither his absence nor his inability to call-in could be said to be voluntary – Application allowed

REA INTERNATIONAL INC. O/A ATLAS FLUID SYSTEMS AND DIRECTOR OF EMPLOYMENT STANDARDS; RE HARPAL SINGH .................................................. 794

Health and Safety – The Toronto Police Association appealed an inspector's decision that the Toronto Police Services Board had not failed to take every precaution reasonable in the circumstances through the implementation of TPSB's mandatory name tag policy for members, while in uniform – The TPA argued there was an increased risk of psychological and physical harm due to today's electronic environment availability where this information can lead to access to addresses, telephone numbers and other personal information – On reviewing the history of the issue, the legal framework, other ways officers' names become known to the public, and specific incidents, among other matters, the Board determined whether the TPSB had taken every precaution reasonable in the circumstances, given the particular circumstances of the TPS which includes the fact that policing is an inherently dangerous profession; that during the course of their duties officer's names become known to members of the public in a myriad of ways apart from name tags; and that the presence of name tags has not increased the risk of harm to officers from organized crime; and that neither the frequency nor severity of threats from mentally ill persons has increased as a result of the use of name tags – Given that the evidence did not establish that the wearing of name tags was related to any material increase in risk, the Board dismissed the appeal – Appeal dismissed

TORONTO POLICE SERVICES BOARD AND CHRISTOPHER LYNCH, INSPECTOR; RE TORONTO POLICE ASSOCIATION .................................................. 940

Interim Order – Certification – ETFO applied to represent a bargaining unit of designated early childhood educators – CUPE intervened in the application, asserting that it represented the DECEs in an all employee unit covered by a subsisting collective agreement – The status of the DECEs was the subject of an on-going grievance between CUPE and the school board in which the arbitrator had denied ETFO status to intervene – The issue for the Board was whether it should determine if the employees affected by the application for certification are covered by a collective agreement, or if an arbitrator should make that decision – ETFO asked for an interim order that would have the Board ask CUPE and the school board to adjourn their grievance pending the outcome of the application for certification – The Board held that its jurisdiction to determine the issue was parallel to the arbitrator's, with neither being superior to the other; the Board is not bound by any arbitration award – A proceeding before the Board best protects the natural justice rights of all the parties, including the employees, so the Board chose not to defer to arbitration – Interim ordered dismissed; matter continues

DISTRICT SCHOOL BOARD OF NIAGARA; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE CUPE .......................................................................... 743

Interim Relief – Discharge for Union Activity – Unfair Labour Practice – The employer terminated an inside organizer for soliciting employees during working hours – The union brought an application for interim reinstatement – The employer maintained the reason underlying the discharge of the employee was the fact of solicitation during working hours (and the previous warning given) and not the subject matter of the solicitation (to join the union) – Given the lack of a no-solicitation policy upon which it could rely and the employer's apparent tolerance shown for other discussions during working time, the Board found it appeared unlikely that the inside organizer would have been terminated had he been soliciting for any other cause – It therefore appeared to the Board that the termination was the result not simply of soliciting during working hours, but at least in part because he was a known and active organizer on behalf of the union –

The four criteria under s. 98(2) having been met, the Board ordered interim reinstatement – Interim Relief granted

SOBEYS INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A ........ 825

Intervenor – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Standing – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA ........ 751

Judicial Review – Construction Industry Grievance – Delay – The Sheet Metal Workers and the IBEW sought judicial review of two Board decisions which found that a 1965 Working Agreement signed by Ellis Don did not confer bargaining rights on the unions and was not a recognition agreement – The IBEW also sought to challenge one of the Board decisions for delay – The Court found the Board's decision-making process in each case was transparent, intelligible and justifiable – On the issue of the two-year delay in issuing a decision, the Court held that the union failed to show any prejudice, and was unable to rebut the presumption of regularity of the Board's proceedings – Applications dismissed

ELLIS-DON LIMITED, ELLIS DON CORPORATION AND OLRB; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE ........ 1016

Judicial Review – Construction Industry Grievance – The union sought review of the Board's interpretation of the term "working conditions" in the collective agreement – The Board found that the employer's requirement that workers wear metatarsal safety boots were an enhanced safety policy and not an "exceptional" working condition – The Court held that the Board's contextual approach to its interpretation of the collective agreement was reasonable – Application dismissed

AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC. AND OLRB; RE IBEW LOCAL 105 ........ 1010

Judicial Review – Natural Justice – Stay – An employee brought an application to stay a Board decision directing the settlement by arbitration of a first contract between Rainbow and Operating Engineers – The employee had sought judicial review of the Board's (and the Minister's) respective first contract and final offer vote decisions on the basis that the Board and the Minister had violated his rights (and the rights of other employees) to procedural fairness and natural justice, since neither the Board nor the Minister gave the employees notice or an opportunity to participate in the proceedings – The court stated that the only effect of the arbitration proceeding on the applicant would be the imposition of a collective agreement and the applicant had conceded that it was unlikely that he will be adversely affected by the terms of such an agreement – Since the arbitration proceeding would not affect or exacerbate any harm done to the applicant as a result of the alleged denial of rights, the court found that the applicant had failed to establish irreparable harm – Motion dismissed

MARK CORNER; RE ONTARIO (MINISTER OF LABOUR); OLRB; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RAINBOW CONCRETE INDUSTRIES LIMITED........................................................................... 1011

Jurisdictional Dispute – Construction Industry – Work in this dispute consisted of carpentry portions of concrete forming work for footings, retaining walls and planter boxes located outside of the building structure at the North Bay Regional Health Centre Project – The general contractor on the project, PCL was bound to both the Carpenters' and the Labourers' ICI agreements – PCL subcontracted certain concrete forming work to Downsview, which was not bound to the Carpenters' ICI agreement – Downsview assigned the concrete forming work to the Labourers – The Carpenters filed a grievance against PCL for violating the subcontracting clause of the ICI agreement – In response, the Labourers filed a jurisdictional dispute – A primary issue was whether the work in dispute fell within the ICI sector or in the roads sector of the construction industry – Considering the usual factors in sector disputes, the Board found that the work in dispute was work that fell within the ICI sector – The Board then proceeded to determine the merits of the jurisdictional dispute and found that the work in dispute ought to have been assigned to the Carpenters rather than to the Labourers – It was ICI work and the Carpenters had a collective agreement covering the work in dispute while the Labourers did not – The area practice evidence favoured the assignment of the work to the Carpenters – The employer practice evidence filed by the Labourers, PCL and Downsview was not persuasive and the economic and efficiency evidence favouring the Labourers was not sufficient enough to dislodge the significance of the collective agreement obligations owed to the Carpenters – Application allowed

PCL CONSTRUCTORS CANADA INC., THE DOWNSVIEW GROUP, GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, LOCAL 2486, AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; LIUNA, LOCAL 493 AND UNIVERSAL WORKERS' UNION, LIUNA, LOCAL 183.................................................................... 771

Natural Justice – Judicial Review – Stay – An employee brought an application to stay a Board decision directing the settlement by arbitration of a first contract between Rainbow and Operating Engineers – The employee had sought judicial review of the Board's (and the Minister's) respective first contract and final offer vote decisions on the basis that the Board and the Minister had violated his rights (and the rights of other employees) to procedural fairness and natural justice, since neither the Board nor the Minister gave the employees notice or an opportunity to participate in the proceedings – The court stated that the only effect of the arbitration proceeding on the applicant would be the imposition of a collective agreement and the applicant had conceded that it was unlikely that he will be adversely affected by the terms of such an agreement – Since the arbitration proceeding would not affect or exacerbate any harm done to the applicant as a result of the alleged denial of rights, the court found that the applicant had failed to establish irreparable harm – Motion dismissed

MARK CORNER; RE ONTARIO (MINISTER OF LABOUR); OLRB; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RAINBOW CONCRETE INDUSTRIES LIMITED........................................................................... 1011

Practice and Procedure – Accreditation – Construction Industry – Employer – Section 136 of the Act requires the Board to find a "double majority" – The "employer majority" is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule "E" list – The "employee majority" is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application – The applicant Association filed evidence that it represented 11 of 38 employers on the Preliminary Schedule "E" List – The applicant, responding party union and intervening union all supported the position that where an employer does not make an Employer Filing, it must be removed from Schedule "E" – The Board however found that the lack of an Employer Filing was insufficient to remove an employer from Schedule "E" – The Board noted that no party had suggested that the 27 employers should be removed from Schedule "E" because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date – Finally, the Board found that nothing in its Rules or in the warning to employers that if they do not make an Employer Filing they may be deemed to accept all of the facts in the Application, relieves the applicant from establishing the statutory prerequisites required – Since the applicant filed evidence of representation for 11 employers and the Final Schedule "E" was composed of 38, the applicant failed to establish the "employer majority" set out in s. 136(2)(a) – Application dismissed

THE UTILITY CONTRACTORS ASSOCIATION OF ONTARIO INCORPORATED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 183, 247, 493, ET AL; RE SEWER AND WATERMAIN, CURB, GUTTER AND SIDEWALK CONTRACTORS' SECTION OF THE LONDON AND DISTRICT CONSTRUCTION ASSOCIATION; UNIVERSAL WORKERS UNION, LABOURERS', 183, 625, 1059 AND 1089........................................................................ 994

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Intervenor – Standing – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA ........................................................................ 751

Practice and Procedure – Certification – Construction Industry – Status – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver "detailed statement of facts" supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to relieve against the application of the bulletin – Matter continues

BURNHAMTHORPE ROOFING CO. LTD. (1994); RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51 ...................................... 733

Practice And Procedure – Certification – Representation Vote – In this application for certification, an issue arose regarding whether or not the failure to segregate ballots should cause the Board to exercise its discretion to order a second vote – The applicant failed to provide its scrutineer with a list of challenges at the vote; consequently, the voters' list used did not note the applicant's challenges – The applicant subsequently signed off certifying that the balloting was conducted fairly – At the Regional Certification Meeting, the parties agreed on the status of five individuals whose names appeared on the applicant's list of challenges, but whose ballots had not been segregated; the parties agreed that three of those individuals were not employees in the bargaining unit – The vote was counted at 83 against the applicant and 81 for, meaning the three ballots of the non-employees could be determinative of the application – Second vote ordered

ROYAL VICTORIA HOSPITAL; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA ...................................................................................... 811

Reference – Collective Agreement – Conciliation – The Minister sought advice on whether he could appoint a conciliation officer pursuant to s. 18(2) – The evidence established that prior to the termination of the collective agreement (which had an automatic renewal clause) the union representative left voicemail messages advising that they wished to set dates for bargaining and that their only demand was to increase wage rates to a specific amount; and that the employer representative called the union representative back and spoke with him, at which time he reiterated the demand for wage rate increase – As neither party had given written notice to bargain, the critical question was whether the parties had "met and bargained" – The Board, following *Danver Ambulance*, found that the words "met and bargained" did not necessarily mean a face-to-face meeting provided that a person authorized to bargain for one party makes a clear offer on one or more issues to be negotiated to a person authorized to bargain for another party – The Board also noted that given the advancement in technology since *Danver* was written, its reasoning is that much more persuasive today – The Board found that the conditions for the application of s. 18(2) were present – Advice given

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18........................................................................ 739

Related Employer – Abandonment – Bargaining Rights – Construction Industry – Delay – Sale of Business – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

SOMERVILLE CONSTRUCTION ET AL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA............ 839

Representation Vote – Certification – Practice And Procedure – In this application for certification, an issue arose regarding whether or not the failure to segregate ballots should cause the Board to exercise its discretion to order a second vote – The applicant failed to provide its scrutineer with a list of challenges at the vote; consequently, the voters' list used did not note the applicant's challenges – The applicant subsequently signed off certifying that the balloting was conducted fairly – At the Regional Certification Meeting, the parties agreed on the status of five individuals whose names appeared on the applicant's list of challenges, but whose ballots had not been segregated; the parties agreed that three of those individuals were not employees in the bargaining unit – The vote was counted at 83 against the applicant and 81 for, meaning the three ballots of the non-employees could be determinative of the application – Second vote ordered

ROYAL VICTORIA HOSPITAL; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA........................................................................................ 811

Sale of Business – Abandonment – Bargaining Rights – Construction Industry – Delay – Related Employer – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

SOMERVILLE CONSTRUCTION ET AL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ............ 839

Standing – Construction Industry – Alteration of Jurisdiction – Intervenor – Practice and Procedure – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA ........................................................................ 751

Status – Certification – Construction Industry – Practice and Procedure – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver "detailed statement of facts" supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to relieve against the application of the bulletin – Matter continues

BURNHAMTHORPE ROOFING CO. LTD. (1994); RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51 ...................................... 733

Stay – Judicial Review – Natural Justice – An employee brought an application to stay a Board decision directing the settlement by arbitration of a first contract between Rainbow and Operating Engineers – The employee had sought judicial review of the Board's (and the Minister's) respective first contract and final offer vote decisions on the basis that the Board and the Minister had violated his rights (and the rights of other employees) to procedural fairness and natural justice, since neither the Board nor the Minister gave the employees notice or an opportunity to participate in the proceedings – The court stated that the only effect of the arbitration proceeding on the applicant would be the imposition of a collective agreement and the applicant had conceded that it was unlikely that he will be adversely affected by the terms of such an agreement – Since the arbitration proceeding would not affect or exacerbate any harm done to the applicant as a result of the alleged denial of rights, the court found that the applicant had failed to establish irreparable harm – Motion dismissed

MARK CORNER; RE ONTARIO (MINISTER OF LABOUR); OLRB; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RAINBOW CONCRETE INDUSTRIES LIMITED.............................................................................. 1011

Trade Union – Bargaining Rights – Union Successor Rights – Unfair Labour Practice – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of "constitutional continuity" – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.); RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION........................ 871

Unfair Labour Practice – Bargaining Rights – Trade Union – Union Successor Rights – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of "constitutional continuity" – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.); RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION........................ 871

Unfair Labour Practice – Certification – Construction Industry – Employer – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed

MIMICO GROUP INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ........................................................................................ 760

Unfair Labour Practice – Certification – Employer Support – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 .......... 850

Unfair Labour Practice – Certification – Employer Support – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787 .......... 850

Unfair Labour Practice – Discharge for Union Activity – Interim Relief – The employer terminated an inside organizer for soliciting employees during working hours – The union brought an application for interim reinstatement – The employer maintained the reason underlying the discharge of the employee was the fact of solicitation during working hours (and the previous warning given) and not the subject matter of the solicitation (to join the union) – Given the lack of a no-solicitation policy upon which it could rely and the employer's apparent tolerance shown for other discussions during working time, the Board found it appeared unlikely that the inside organizer would have been terminated had he been soliciting for any other cause – It therefore appeared to the Board that the termination was the result not simply of soliciting during working hours, but at least in part because he was a known and active organizer on behalf of the union –

The four criteria under s. 98(2) having been met, the Board ordered interim reinstatement – Interim Relief granted

SOBEYS INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A ........................................ 825

Union Successor Rights – Bargaining Rights – Trade Union – Unfair Labour Practice – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of "constitutional continuity" – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.); RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION ........................ 871

**1307-10-R** The International Union of Painters and Allied Trades, Local 1891, Applicant v. **Biggs & Narciso Construction Services Inc.**, Responding Party v. Labourers' International Union of North America, Local 1059, Tim Scott, Intervenors

**Bargaining Rights – Certification – Construction Industry – The Painters applied to certify employees of the respondent pursuant to s.128.1 of the Act – The Respondent and Intervenor sought to have the application dismissed because on the application filing date the Painters still held bargaining rights for the unit of employees – The unit was the subject of a termination application filed during the open period – The ballots in the termination were counted on the date of filing of the application for certification, and the Painters lost the vote – By decision one week later, the Painters' bargaining rights were terminated – The next day, the Board dealt with the instant application for certification, finding that it was appropriate to exercise its discretion pursuant to s. 111(3)(b) of the Act and finding that the application for certification was timely – Certificates were issued – LIUNA subsequently sought reconsideration and intervenor status in the matter – The Board found that LIUNA had the right to intervene, reconsidered its decision and revoked the certificates – The issue before the Board was whether the Painters' application should be dismissed because they still held bargaining rights on the date of application for certification – The Board found that the Painters filed a valid application for certification in the context of knowing that they were shortly to have their bargaining rights terminated, and that the application was properly treated under s. 111(3)(b) of the Act – Matter continues**

**BEFORE:** *Marilyn Silverman*, Vice-Chair.

**APPEARANCES:** *Doug Wray* and *Greg Smith* appeared on behalf of the applicant; *David Chondon, Kelsey Orth, Luis Narciso, Nelson Narciso* and *Sue Vernon* appeared on behalf of the responding party; *L.A. Richmond, B. MacKinnon* and *J. Shroyer* appeared on behalf of the Labourers' International Union of North America, Local 1059; *Terry Hawtin* appeared on behalf of Tim Scott.

**DECISION OF THE BOARD:** November 18, 2010

1. This is an application for certification filed by the International Union of Painters and Allied Trades, Local 1891 (the "Painters") under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act (the "Painters' application"). It was filed on July 8, 2010.

2. The Painters seek to represent individuals of Biggs & Narciso Construction Services Inc. (the "employer" or "Biggs & Narciso") in the following bargaining unit:

> all painters and painters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the responding party in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the City of Toronto, the

> Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.
>
> Clarity note: should be added to provide that Painters in the above bargaining unit include Asbestos Removers and Mold Removers.

3. This decision deals with whether or not this application should be dismissed because on July 8, 2010, the application filing date, the Painters still held bargaining rights. Both the Labourers' International Union of North America, Local 1059 ("Local 1059") and Tim Scott, an employee of Biggs & Narciso assert that the application should be dismissed on this basis.

4. Biggs & Narciso is a demolition contractor specializing in asbestos abatement. Biggs & Narciso is bound to the Provincial Demolition Agreement and the Provincial ICI Collective Agreement with Local 1059. The employer was bound to the Painters' Provincial ICI Agreement up until the events described below. As such, Biggs & Narciso has a history of a bargaining relationship with both trade unions.

5. On April 28, 2010, Tim Scott, an employee of Biggs & Narciso, filed an application to terminate the Painters' bargaining rights, Board File No. 0391-10-R (the "termination application"). The responding parties in that application were "[The] International Union of Painters & Allied Trades and International Union of Painters & Allied Trades Local Union 1590". The collective agreement between the Painters and Biggs & Narciso, as a provincial collective agreement in the ICI sector of the construction industry, was set to expire on April 30, 2010. Because this was a provincial agreement, the responding parties in the termination application were the international union and all affiliated bargaining agents.

6. The termination application was processed in the normal course and a representation vote was held on May 10, 2010. Because of the number of disputes in the termination application, the ballot box was sealed. The parties to the termination application met with a Labour Relations Officer on July 8, 2010 and agreed to ballots being counted. The result of that count was that the the Painters did not obtain sufficient support to retain bargaining rights.

7. The Painters filed this application on that same day, July 8, 2010. The applicant in the certification application is "The International Union of Painters and Allied Trades, Local 1891".

8. The Board issued its decision in the termination application on July 15, 2010, terminating the bargaining rights of the Painters.

9. By decision dated July 16, 2010 the Board (differently constituted) considered this application in the normal course. It noted the earlier termination application, applied section 111(3) of the Act and dealt with the application as follows in part of paragraph 3 of that decision:

> In this case, in my view it is appropriate to exercise the Board's discretion pursuant to section 111(3)(b) of the Act in dealing with this application. Since the earlier application was successful, there are no bargaining rights

> that can affect this application. Therefore, the Board finds that this application is timely and can proceed on its merits.

10. On the basis of that determination, the Board granted the certificates to the Painters in this application.

11. The Board issued another decision on July 22, 2010 following receipt of an intervention by Local 1059. It sought submissions as to whether Local 1059 had status to intervene and whether the intervention was timely. After receipt of those submissions, the Board reconsidered its July 16, 2010 decision and revoked the certificates issued to the Painters. It found that Local 1059 had standing to participate and its intervention was timely.

**Submissions**

12. Local 1059 argues that once the Painters' bargaining rights were terminated, the employees who had been represented by the Painters were included in Local 1059's unit. The position is that Local 1059 filled the void and there was a change of representation.

13. Local 1059 says that, since the termination application, the asbestos work at Biggs & Narciso is performed by Local 1059 under its Demolition Agreement. A decision in this case to allow the Painters' application to proceed would undo what union these employees think they are in and what terms and conditions of employment they work under. Local 1059 says that this case is an example of conflicting applications without regard for the open period.

14. Local 1059 argues that this application should be dismissed on the basis that it is untimely, and that the Painters are attempting to displace themselves.

15. Local 1059 asserts that the Painters are attempting to displace themselves, contrary to the decision set out in *Bernel Masonry Inc.*, 2010 CanLII 48515 (ON L.R.B.). Local 1059 also says that an application for certification can only be made in the open period. The open period closed on April 30, 2010 and there was no application for certification from the Painters as of that date.

16. Local 1059 argues that the Painters' bargaining rights were not terminated until the Board issued its July 15, 2010 decision. In Local 1059's view, the Painters held bargaining rights on July 8, 2010 (and at all times up until July 15, 2010) and as a consequence its certification application could not be timely.

17. Local 1059 says that *Bernel* changed the law and trade unions must now justify to the Board their right to be certified. It says that *Bernel* applies in this case because the Painters are using their incumbency status to undermine the fundamental employee right to terminate bargaining rights and the Board should abide by the employee wishes in that application.

18. Local 1059 highlights that the termination of bargaining rights occurred pursuant to a representation vote.

19. Local 1059 then deals with the application of 111(3) of the Act. That subsection applies when a representation application (an application for certification or a termination application) is filed in the face of an earlier representation application that has not been finally

determined. As it applies to this case, Local 1059 asserts that the Board can treat the Painters' application as having been made on the date of the termination application, April 28, 2010 and since the termination application succeeded effective July 15, 2010, the Painters' application must be dismissed.

20. Counsel for Mr. Scott supports the submissions advanced by Local 1059. He describes the particulars of this workplace in that employees represented by two different trade unions work side by side and are paid different rates of pay. He says that, once the Painters' rights were terminated, they became represented by Local 1059.

21. Counsel for Mr. Scott contends that on July 8, 2010, when the Painters' application was filed, the Painters still held bargaining rights. The Painters were, as of that date, still required to represent employees of Biggs & Narciso under the Painters' Collective Agreement and dues were still paid to the Painters.

22. Counsel for Mr. Scott says that the Painters' rights were lawfully terminated during the open period and if the Painters' application is timely, the system is undermined. He says that the window closed on April 30, 2010. Finally, Counsel for Mr. Scott says that to apply section 111(3) in favour of the Painters is not the intent of the legislation and unfair to employees who he contends are now represented by Local 1059.

23. The Painters say that the facts of this case fall squarely within section 111(3)(b) of the Act and that *Bernel* does not apply. It asserts that this case is about representation and there is no legal authority for the position advanced by Local 1059 that its bargaining rights expanded once the Painters' rights were terminated.

24. The Painters say that Local 1059 have conflated work jurisdiction with bargaining rights and refers to: *Flynn Canada Ltd.*, 2009 CanLII 24162 (ON L.R.B.); *Elmara Construction Co. Ltd.*, 2009 CanLII 21120 (ON L.R.B.); *North Shore (Sault) Insulations Ltd.*, 2008 CanLII 40582 (ON L.R.B.); *HVM Holdings Inc.*, 2008 CanLII 799 (ON L.R.B.); *Standard Underground High Voltage Ltd. and Power Cable Installations (Toronto) Ltd.*, 2002 CanLII 20866 (ON L.R.B.); *Semple-Gooder Roofing Ltd.*, 1983 CanLII 864 (ON L.R.B.); *Industrial Lighting and Contracting Limited*, 1979 CanLII 984 (ON L.R.B.).

25. Biggs & Narciso does not adopt the positions of either trade union. It clarified however that it does not agree that the bargaining rights of Local 1059 were extended to individuals after the Painters' bargaining rights were terminated.

## Decision

26. The issue before me is whether the Painters' application should be dismissed on the basis that, when the Painters applied for certification, on July 8, 2010, the Painters still held bargaining rights. Local 1059 relies on the timing of when this application was filed in relation to the termination application combined with the principles established in *Bernel*.

27. The Painters are asking to represent their designated trade. The fact that Local 1059 represents other workers in the workplace does not detract from the Painters' right to apply to represent their trade. A trade union who seeks to be certified is *prima facie* entitled to do so if it meets the statutory requirements of the Act.

28. One limitation on that right is the principle expressed in *Bernel.* In *Bernel*, the Board dealt with whether an application by a trade union that already holds bargaining rights for all of the employees in the bargaining unit for which it seeks certification as bargaining agent is an application for certification within the meaning of section 7 of the Act. The Board found that it was not.

29. This case is not about closing the statutory open period through a displacement application, but rather a dispute between two trade unions who represent and/or seek to represent employees of an employer. The Board was clear in *Bernel* about the scope of the principle enunciated in that decision. The essence of the reasoning in *Bernel* is found at paragraphs 59 and 66:

> 59. The Board is not persuaded that, other than closing the open period, BACU stands to acquire anything by way of these applications. There is no purpose to be served by these applications and, in the Board's view, that is sufficient to lead to the conclusion that the Act does not contemplate the filing of an application by an incumbent trade union to displace itself. It is illogical to suggest that one can apply for a status that one already has at a point in time when that status is not in any way under threat or challenge. The purpose of the certification provisions is to provide a trade union with a status as the employees bargaining representative and oblige the employer to recognize the union and negotiate in good faith to achieve a collective agreement. Once a trade union has such status, and it has not been terminated, no certification application can be brought as it is simply not contemplated by the Act.
>
> ...
>
> 66. If an incumbent trade union can apply to be recertified, the very purposes of the Act would be undermined. As discussed above, one of the purposes of the Act is to facilitate collective bargaining between employers and *trade unions that are the freely-designated representatives of the employees*. In order to be certified, trade unions must establish a level of support amongst the employees in the bargaining unit at a level and in a manner dictated by the provisions of the Act. The Act then provides for "open periods" during which employees have the opportunity to remove or replace the bargaining agent. Section 58 prevents parties from early renewing their collective agreement and depriving employees of the operation of an open period absent consent of the Board. Once the Board dismisses a certification application because the applicant lost the vote or certifies the applicant, the open period closes and no additional certification applications can be filed. Thus, by simply filing its own application for certification and triggering the statutory requirement that the Board conduct a vote, an applicant trade union could close the open period and deny its own members their statutory right to replace the incumbent. In circumstances where an application serves no purpose but will have the effect of undermining fundamental employee rights and freedoms as well as the purposes of the Act, it is reasonable to interpret the Act so as not to contemplate such an application.

30. In this case, the termination application was filed in the open period and stands as proof that the arrangement that the Board addressed in *Bernel* did not occur here. Mr. Scott's termination application was filed in the open period and processed accordingly. In *Bernel*, the

applicant sought to obtain rights it already had. The Painters filed an application under section 128.1 of the Act and as is required with that application, they have filed membership evidence in support. The purpose served by the Painters' certification application is to regain rights they had. It does not seek to regain those rights in a vacuum but rather accompanied by evidence of employee support. It is not as in *Bernel*, an act with no purpose other than to close the open period to which employees are entitled. In this case there is a clear competition between bargaining rights and representation that did not inform the facts in the *Bernel* case. Accordingly, the principles in *Bernel* do not apply to these facts.

31. Next I turn to the considerations under section 111(3) of the Act. This section reads as follows:

> **111.** (3) Despite sections 7 and 63, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for the certification or for the declaration is made with respect to any of the employees affected by the original application, the Board may,
>
> (a) treat the subsequent application as having been made on the date of the making of the original application;
>
> (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
>
> (c) refuse to entertain the subsequent application.

32. The purpose of this section is to deal with competing representational claims. When there are competing applications regarding representation, roughly contemporaneous in time, the Board is empowered under this section to determine how to treat them. It is instructive to note that unlike the certification sections of the Act, there is no statutory bar that follows an application to terminate bargaining rights. There is accordingly no time period after the termination of the Painters' bargaining rights that a union had to wait before applying for certification. Section 111(3) is discretionary. In the exercise of that discretion, the Board is informed by the option that best addresses the legal and policy considerations at play.

33. In this case, the Painters have a right to apply to represent their designated trade and they have filed membership evidence in order to do so. They did so in the context of knowing that they were shortly to have their bargaining rights terminated. In these circumstances, I see no reason why the Board would apply subsection 111(3)(c) and refuse to entertain this application.

34. Similarly, section 111(3)(a) is not an appropriate resolution. There is no reason to treat the Painters' application as having been filed during the currency of its Provincial Collective Agreement. To do so would confound the application because, if the earlier date were chosen, the Painters would then still have represented their trade and there would have been no reason for the application.

35. In my view, the treatment afforded the Painters' application in the July 16, 2010 decision is the correct one – that the Board exercise its discretion and consider this application under section 111(3)(b) of the Act. After the ballots were counted in the termination application, the disposition of that application was a certainty. The reason the July 16, 2010 decision was reconsidered is that Local 1059 raised an interest as intervenor, which status the Board granted. Local 1059 and Mr. Scott have now had the opportunity to make full submissions on the timeliness of the Painters' application. I have carefully considered them and I find that the Painters' application ought to be considered on its merits under section 111(3)(b).

36. When the Board received the Painters' application on July 8, 2010, the Board postponed consideration of it until a "final decision" issued in the termination application, on July 15, 2010. When the Board considered the Painters' application, on July 16, 2010, the Painters' bargaining rights had been terminated. As of that date, the Painters were entitled to have the Board consider this application.

37. Accordingly, I am prepared to exercise my discretion under section 111(3)(b) in favour of the applicant for the reasons stated above and decline to dismiss the application as requested by Local 1059.

38. Other issues are in dispute. The application is hereby referred to the Registrar to schedule for hearing.

39. I am not seized.

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**3954-09-R** United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Burnhamthorpe Roofing Co. Ltd. (1994)**, Responding Party v. Sheet Metal Workers' International Association, Local 51, Intervenor

**Certification – Construction Industry – Practice and Procedure – Status – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver "detailed statement of facts" supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to relieve against the application of the bulletin – Matter continues**

**BEFORE**: *Charles E. Humphrey*, Vice-Chair, and Board Members *John Tomlinson* and *Alan Haward*.

**APPEARANCES:** *Jesse Nyman* and *Darren Sharpe* for the applicant; *Robert Bell* and *Felicia Tiberia* for the responding party; *S.B.D. Wahl, H. Biso* and *J. Jackson* for the intervenor.

**DECISION OF THE BOARD**: December 13, 2010

1. This is an application for certification filed under the construction industry provisions of the Labour Relations Act in which the applicant seeks to displace the intervenor. On May 28, 2010 the Board issued a decision in this application which contained the following summary of the issues in dispute:

> 2. A representation vote took place on April 7, 2010. Subsequent to the vote, a Regional Certification Meeting took place on April 28, 2010 and the parties have filed their respective status submissions. Both the responding party and the intervenor assert the following individuals were performing bargaining unit work on the date of application and, therefore, should properly be on the list of employees/eligible voters:
>
> 1. Matt Drozdoski
> 2. Shawn Snow
>
> The applicant asserts these two (2) individuals were not at work on the application filing date and are not employees of the responding party.
>
> 3. The intervenor also asserts the following individuals were performing bargaining unit work on the date of application and, therefore, should properly be on the list of employees/eligible voters.
>
> 7. Carl Fraser
> 8. Eugene Malyshev
> 9. Claude Morin
>
> Both the responding party and the applicant assert these three (3) individuals did not work on the date of application and that these individuals were not assigned to work that day, and hence, were not employees who performed bargaining unit work on the date of application.
>
> 4. The applicant asserts that the following individuals were performing bargaining unit work on the date of application and, therefore, should properly be on the list of employees/eligible voters:
>
> 3. Steve Henderson
> 4. Will McLaren
> 5. Eric Rooyakers
> 6. John Rooyakers
>
> Both the responding party and the intervenor assert that these four (4) individuals did not work on the date of application, were not assigned to work, and if they did work, it was done without authorization as the site at which they worked does not allow Sunday work without the permission of the site superintendent. As a result, these individuals were not employees who performed bargaining unit work on the date of application.

2. Hearings to deal with the status issues described in the Board's May 28 decision were scheduled for November 15 and 18, 2010. The parties requested an adjournment of the November 18 hearing date.

**The Dispute**

3. On November 3, 2010 counsel for the applicant sent an email to counsel for the intervenor regarding the order of calling witnesses. Counsel for the intervenor replied the same day. In his email he included a request that Will McLaren and Steve Henderson provide a number of documents at the scheduled hearing. The documents requested went to the question of whether or not these individuals were employees or independent contractors at the time the application was filed. The question of whether individuals engaged in residential shingling are employees of an employer or employers in their own right has arisen with regularity in applications for certification in this part of the construction industry.

4. Counsel for the Applicant wrote to the Board on November 12, 2010 taking the following position regarding the documentation requested by the intervenor relating to McLaren and Henderson:

> The Intervenor requested a number of documents which appear to only be relevant to a question as to whether or not Mr. McLaren and Mr. Henderson are independent contractors and thus allegedly not employees of the Responding Party. We objected to the request and advised we would object to the Intervenor or the Responding Party pursuing a challenge to the status of Mr. McLaren and Mr. Henderson on that basis. The Applicant's position is that the only subsisting challenge to the status of Mr. McLaren and Mr. Henderson is that they were not at work on the Application Filing Date, and if they were, it was without authorization.

**Factual Background**

5. On April 6, 2010 prior to the vote being held counsel for the intervenor wrote to the Board taking the position that, amongst other things, McLaren and Henderson were "not properly on the List of Employees and Eligible Voters because:

> 1. they are not employees for purposes of the Act;
> 2. they were not present at work on the Date of Application; and
> 3. they did not perform bargaining unit work for the majority of their time on the Date of Application"

6. On April 14, 2010 counsel for the intervenor again wrote to the Board. In his letter he again took the position that McLaren and Henderson "are not Employees of the Responding Party Burnhamthorpe Roofing and/or were not present at work performing bargaining unit work on the Date of Application".

7. The Certification Worksheet prepared at the vote indicates that the Intervenor challenged McLaren's and Henderson's inclusion on the voters' list on the following basis: "not an employee; not performing barg. unit work; not at work on date of app." At the Regional

Certification meeting held on April 28, 2010, no changes were made to the Certification Worksheet as it related to the intervenor's challenges of McLaren and Henderson.

8. On May 4, 2010 counsel for the intervenor and counsel for the applicant filed status dispute submissions. The submissions of both counsel were essentially limited to submissions relating to those who they claimed should be on the voters' list. Counsel for the intervenor did not make any mention of McLaren or Henderson in his May 4th submission although he did indicate that the only persons who should be on the voters' list were the individuals listed in his submission. McLaren and Henderson were not on that list.

9. On May 7, 2010 Counsel for the applicant and for the intervenor made submissions in response to the May 4th submissions. The applicant's submissions provide particulars of the basis upon which it objected to the inclusion on the voters' list of the individuals named in the intervenor's submissions of May 4, 2010. The intervenor in its reply submissions made the following comments with regard to McLaren and Henderson:

> Neither McLaren nor Henderson nor John Rooyakers nor Eric Rooyakers were authorized to work on Sunday, March 28 - and any purported authorization from Local 27 does not count. McLaren and Henderson were not employed on the application date - notwithstanding any self-serving so-called Local 27 "record" created 2 weeks later that may say otherwise. John and Eric Rooyakers were not employed on the application date either. They do not claim that they were working and they did not vote. They are irrelevant for the purposes of the within application.

## Legal Background

10. The Board's Information Bulletin No. 9 deals with status disputes in the Construction Industry. The bulletin contains the following direction to parties regarding submissions relating to status disputes:

> b) Parties File and Deliver Submissions on the Substantive Issues
>
> Where a party asserts that an individual should be on the employee list, the voters list, or the section 8.1 list and such assertion is disputed by the other party, the party asserting that the individual should be on the list must file with the Board and deliver to the other party a detailed statement of the facts upon which it relies in support of its position that the individual in dispute is properly on the list, along with a copy of all documents upon which it relies, by 5:00 p.m. on the Tuesday following the Regional Certification Meeting. [When both parties assert that there are persons who should be added to the list, then both parties must comply with this obligation.]
>
> Each party that disputes an assertion made by the other party that an individual should be on the list must file with the Board and deliver to the other party a detailed statement of the facts upon which it relies in support of its position that the individual in dispute is not properly on the list, along with a copy of all documents upon which it relies, by 5:00 p.m. on the following Friday. [When both parties assert there are persons who should not be on the list, then both parties must comply with this obligation.]

> In the normal course, the burden of proof lies on the party making the assertion that an individual should be on the list and that party also has the responsibility for ensuring that individual's attendance at the hearing, unless the Board orders otherwise.
>
> A party will not be permitted to adduce evidence with respect to any facts it has not set out in its written submissions except with leave of the Board.

11. Counsel for the applicant takes the position the intervenor should be prohibited from pursuing the issue of whether McLaren and Henderson were employees or independent contractors at the relevant time. Both counsel made extensive submissions on the issue. In the Board's view resolving the issue in dispute requires the answering of two questions:

> (1) Did the intervenor put in question whether McLaren and Henderson were employees or independent contractors in accordance with Information Bulletin No. 9?
>
> (2) If not, what is the consequence of the failure to do so in the context of this application?

**Decision**

12. With regard to the first question it is the Board's view that based on the submissions of May 4, 2010 and May 7, 2010 the intervenor did not put in issue the question of whether McLaren and Henderson were employees/independent contractors and not employees in the manner required by Information Bulletin No. 9. The letter of May 4 does not mention McLaren and Henderson. The intervenor's submissions of May 7, on a reasonable reading, do not raise the issue. The submissions amount to a claim, as described in the Board's May 28, 2010 decision, that McLaren and Henderson, "did not work on the date of application, were not assigned to work, and if they did work, it was done without authorization". The intervenor did not provide a "detailed statement of facts" or indeed any facts in support of a position that McLaren and Henderson should not be on the list because they were not employees but employers/independent contractors.

13. The second question is what should be the consequence of non-compliance with Information Bulletin No. 9? Counsel for the applicant took the position that for the Board to allow the intervenor to pursue the issue where there has not been compliance with Information Bulletin No. 9 would communicate to the community that the requirements of the Bulletin can be ignored with impunity. Counsel for the intervenor referred the Board to subsection 110(16) and 7(4) of the Act. He argued that 7(4) required the Board to determine employee status having regard to the bargaining unit description contained in the existing collective agreement. He interpreted subsection 110(16) as meaning that the Board, while it could establish procedure, such procedure could not result in a party being prevented in a case such as this from having an opportunity to present its case relating to an issue once that issue was raised.

14. By their very nature status dispute hearings are often protracted, consuming substantial quantities of Board resources. Information Bulletin No. 9 is intended to ensure, amongst other things, that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing. It is intended in part to

avoid the delay that often results from a party being taken by surprise part way through a hearing. In addition and equally important, the Bulletin is intended to give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into. The Board has an interest in ensuring compliance with the requirements of the bulletin and avoiding any community perception that intentional non-compliance or carelessness in the manner of compliance will be acceptable to the Board.

15. In the particular circumstances of this case, the Board is of the view that it is not appropriate that it exercise its discretion to allow the intervenor to pursue the issue of whether or not McLaren and Henderson were employees or independent contractors at the relevant time.

16. The intervenor not only failed to provide the "detail statement of facts" required by Information Bulletin No. 9, it did not raise the issue of whether McLaren and Henderson were employers/independent contractors in its May 4 or May 7 submissions. The Board's decision of May 28, 2010 makes the Board's view of the issues in dispute clear. In the Board's view the provisions of subsection 110(16) and 7(4) do not assist the intervenor. The provisions of Information Bulletin No. 9 meet the requirement of subsection 110(16) that the practice and procedure determined by the Board, "give full opportunity to the parties to any proceedings to present their evidence and make their submissions". The Bulletin tells parties how in the case of status disputes in the construction industry they are to present their evidence and make their submissions. The procedures, if followed, allow parties the "full opportunity" contemplated by subsection 110(16). The reason that the intervenor is being deprived of that opportunity is not because of some defect in the Board's practices and procedures found in Information Bulletin No. 9 but because there was non-compliance with the requirement in the Bulletin. The Board has established practices and procedures in Information Bulletin No. 9 which meet the requirement of giving the parties a full opportunity to present their evidence and make their submissions.

17. The intervenor's argument comes down to a claim that subsection 110(16) gives a party a right to make submission and present evidence on an issue even if it has not complied with the requirements of a Board practice or procedure that is compliant with subsection 110(16). Acceding to such a position would render the Board's power to determine its own practice and procedure meaningless. Subsection 110(16) deals with the standard to be met by the practices and procedures which the Board is given the right to establish. It does not give parties permission or a right to make submissions or present evidence in circumstances where they have not met Board practices or procedures which are consistent with the standard of "full opportunity" established by the subsection.

18. Subsection 7(4) provides no assistance to the intervenor. If issues requiring the application of the subsection are raised by a party in a manner consistent with the Board's practices and procedures then the Board will consider the application of the subsection. Where as here, the issue to which subsection 7(4) may have application has not been raised in a manner consistent with the Board's practices and procedures, in circumstances where it could have been had the procedure been followed, the Board has no obligation to apply the subsection as the issue has not been properly brought before the Board.

19. The requirements of Information Bulletin No. 9 are clear. The consequences of non-compliance with the requirements of the bulletin are clearly stated. The Board's decision of May 28, 2010 clearly indicated the matter which the Board considered to be in dispute. The Board

has not been made aware of any extenuating circumstances relevant to the exercise of its discretion. In the circumstances, there is no basis for the Board to exercise its discretion to relieve against the application of the provisions of Information Bulletin No. 9.

20. Having regard to the above, the Board will not hear evidence relating to the question whether McLaren and Henderson were not employees but employers/independent contractors on the application date.

21. We are not seized with this application.

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**1509-10-M City of Hamilton**, Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 18, Responding Party

**Collective Agreement – Conciliation – Reference – The Minister sought advice on whether he could appoint a conciliation officer pursuant to s. 18(2) – The evidence established that prior to the termination of the collective agreement (which had an automatic renewal clause) the union representative left voicemail messages advising that they wished to set dates for bargaining and that their only demand was to increase wage rates to a specific amount; and that the employer representative called the union representative back and spoke with him, at which time he reiterated the demand for wage rate increase – As neither party had given written notice to bargain, the critical question was whether the parties had "met and bargained" – The Board, following *Danver Ambulance*, found that the words "met and bargained" did not necessarily mean a face-to-face meeting provided that a person authorized to bargain for one party makes a clear offer on one or more issues to be negotiated to a person authorized to bargain for another party – The Board also noted that given the advancement in technology since *Danver* was written, its reasoning is that much more persuasive today – The Board found that the conditions for the application of s. 18(2) were present – Advice given**

**BEFORE:** *Lee Shouldice*, Vice-Chair.

**APPEARANCES:** *Richard J. Nixon, Lora Fontana, Gerry Davis* and *Tatha Swann* for the applicant; *Harold F. Caley* and *Glenn Morrice* for the responding party.

**DECISION OF THE BOARD:** December 7, 2010

1. This is a Ministerial reference filed with the Board pursuant to section 115(1) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act"). The Minister seeks the opinion of the Board as to whether he has the authority to appoint conciliation officers with respect to the renewal of two collective agreements that expired on April 30, 2010.

2. The relevant section of the Act for the purposes of answering the Minister's question is subsection 18(2) of the Act, which reads as follows:

> Despite the failure of a trade union to give written notice under section 16 or the failure of either party to give written notice under sections 59 and 131,

> where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

3. The City of Hamilton ("the City") and the United Brotherhood of Carpenters and Joiners of America, Local 18 ("Local 18") are signatories to a collective agreement covering the heavy engineering sector of the construction industry ("the heavy engineering agreement") and to a collective agreement covering the residential sector of the construction industry ("the residential agreement"). The most recent collective agreements both had an expiry date of April 30, 2010. Each collective agreement contains an automatic renewal clause which provides that the agreement will renew for three years unless either party provides written notice to bargain within (in the case of the heavy engineering agreement) the 60 day period prior to April 30, 2010 or (in the case of the residential agreement) within a period of no more than 120 days and not less than 30 days before April 30, 2010.

4. Lora Fontana, the Director, Employee and Labour Relations of the City, testified regarding the relevant events from March, 2010 to July, 2010. The evidence establishes that on April 1, 2010, the President & Business Representative of Local 18, Bob Yakiwchuk, left a voicemail message for Ms. Fontana indicating that "three years were coming up" and that he wanted to set dates for bargaining for both the heavy engineering and residential agreements. Ms. Fontana returned his message the next day but was unable to connect with Mr. Yakiwchuk.

5. On April 9, 2010, Mr. Yakiwchuk left a further message for Ms. Fontana on her voicemail. He indicated in this message that he and his team were available to meet on the Tuesday and Thursday of the following week. In the course of leaving his voicemail message, Mr. Yakiwchuk advised Ms. Fontana that Local 18 was seeking to increase the wage rates in both the heavy engineering and residential agreements from 85% of the rates contained in the Carpenters' Provincial ICI Agreement to 90% of those same rates. Mr. Yakiwchuk indicated in his message that this was the only amendment to the collective agreements that Local 18 was seeking. He also indicated that he did not believe that there would be a long round of collective bargaining given the minor amendments sought for the collective agreements.

6. Ms. Fontana testified that at some point between April 9, 2010 and April 30, 2010, she called Mr. Yakiwchuk and spoke with him. It appears to have been relatively soon after April 9, 2010, because during this call (which Ms. Fontana estimated to be between 5 and 7 minutes in duration) Ms. Fontana advised Mr. Yakiwchuk that she and her bargaining team were not available on the dates he had proposed. During the course of this discussion, Mr. Yakiwchuk reiterated to Ms. Fontana that Local 18 was seeking to raise the wage rate in the two collective agreements from 85% of the rates contained in the Carpenters' Provincial ICI Agreement to 90% of those rates, and that in his opinion bargaining would not take long.

7. The evidence establishes that the parties did meet face-to-face to bargain on June 11, 2010 and on June 30, 2010. On the latter date, the City proposed, for the first time, to eliminate the subcontracting clauses contained in both the heavy engineering agreement and the residential agreement. As one might anticipate, that proposal was not warmly embraced by Local 18. Bargaining quickly came to a halt.

8. Shortly thereafter, the City requested from the Ministry of Labour the appointment of two conciliation officers, one for each of the heavy engineering agreement and the residential agreement. Local 18 subsequently asserted that the City's requests were untimely because the collective agreements had by their terms renewed on April 30, 2010. The City asserted that the Minister had the authority to appoint the conciliation officers pursuant to subsection 18(2) of the Act, and Local 18 disagreed. The Minister thereupon referred that issue to the Board.

9. There is no dispute that before April 30, 2010 neither party gave written notice to the other in accordance with the collective agreement or pursuant to sections 59 and 131 of the Act. Accordingly, for the purpose of determining whether subsection 18(2) of the Act applies, the critical question is whether the parties at any time before April 30, 2010 "met and bargained" for the purposes of that subsection of the Act. In my view, they did.

10. In *Danver Ambulance Service Inc.*, [1985] OLRB Rep. June 833, the Board considered the scope of the words "met and bargained" in what was at that time subsection 16(2) of the Act. In that case, the employer had spoken to a union staff representative by telephone and indicated that if the union were prepared to negotiate two, one-year agreements together, the employer was prepared to give a 5% wage increase automatically with respect to the first year. The union staff representative refused the employer's offer and advised that there were other issues to be dealt with in that agreement.

11. The Board stated the following, at paragraph 17 of its decision:

> 17. The phrase "met and bargained" in section 16(2) has not been the subject of much comment by the Board. In *Adath Catering, supra,* the Board found that, on the facts, the parties had satisfied the standard. (Parenthetically, it is appropriate to note that the collective agreement in question had an automatic renewal clause but the parties had initially met and bargained *before* the expiry of the contract. The parties' conduct post-expiry was found to be consonant with continuation of that bargaining.) Conversely, in *Dryden, supra,* the Board found the parties had not "met and bargained"; the employer had simply made unilateral and *ex gratia* offer of an unspecified wage increase (and another item). The Board does not intend to here set out an extensive analysis of the standard in section 16(2). *However, the Board is of the view that "met and bargained" need not necessarily involve a "face-to-face" meeting provided a person authorized to bargain for one party tables a clear offer on one or more issues to be negotiated to a person authorized to bargain for another party. In the instant case, Monsen, chief negotiator for the employer, made a monetary proposal to Gardner, the union representative. The Board does not consider that the offer was any less an offer because the contact was via the telephone. Monsen did not place his offer on a "without prejudice" basis.* To be sure, it is more usual perhaps for the parties to meet across a bargaining table, often in "teams", and table extensive proposals in writing. As noted, the Board does not consider it appropriate or necessary in this case to set out a definitive statement on the standard in section 16(2). In these, circumstances, though, the Board is of the opinion that the parties met and bargained in December 1984, with respect to the 1985-6 collective agreement. Because the parties' conduct in late Fall 1984 was relied on by the union in its argument, the Board considers it appropriate, although not essential, to include the comments in this paragraph in responding to the Ministerial reference. (emphasis added)

I agree with this analysis. It was a persuasive analysis of the words "met and bargained" in 1985 and, given the exponential development of technology over the past 25 years, it is that much more persuasive today. There are many different possible ways to meet and bargain that do not require physically meeting face-to-face. Accordingly, there is no reason why the words "met and bargained" should be interpreted to mean only a face-to-face meeting, as long as a person who is authorized to bargain for one party makes a clear offer to a person who is authorized to bargain for the other party.

12. Here, the circumstances are very similar to those arising in *Danver Ambulance*. Mr. Yakiwchuk clearly had the authority to bargain on behalf of Local 18. During their discussion in April, 2010 Mr. Yakiwchuk tabled an offer on an issue to be negotiated to Ms. Fontana, who was the lead bargaining representative on behalf of the City and its most senior human resources representative. The offer was clear, and it was made without prejudice. Although the offer made by Mr. Yakiwchuk was not rejected as in the *Danver Ambulance* decision, it is not the rejection that establishes the advent of bargaining, it is the making of the offer that does so.

13. Counsel for Local 18 argued that there was a qualitative difference between the offer made in *Danver Ambulance* and the offer made by Mr. Yakiwchuk in the instant proceeding, which counsel characterized as not bargaining. Counsel for the City submitted that this was a distinction without a difference. I agree. In both instances the party making the offer has clearly indicated what it wants or what it is prepared to give. As noted above, it is the placing of a clear offer onto the table that matters. Here, Mr. Yakiwchuk put a clear offer onto the table.

14. I conclude that the City and Local 18 "met and bargained" during the five to seven minute conversation between Ms. Fontana and Mr. Yakiwchuk held during April, 2010.

15. Counsel for Local 18 noted during argument that in all of the materials filed with the Board and with the Ministry of Labour there was no mention by the City of this five to seven minute conversation. Ms. Fontana acknowledged during her testimony that she reviewed those submissions for accuracy before they were filed. Counsel for Local 18 submitted that the inference could be drawn from the absence of any reference to the conversation that the City did not perceive the conversation to constitute circumstances wherein the parties had "met and bargained". Counsel also asserted that Ms. Fontana had acknowledged during her testimony that the June 11, 2010 meeting was the parties' first bargaining session.

16. With respect to the absence in the materials filed with the Ministry of Labour and the Board of any reference to the five to seven minute conversation with Mr. Yakiwchuk, there does not appear to be any dispute regarding the factual accuracy of that conversation. The testimony offered by Ms. Fontana on this point was given without objection and was not contradicted. In that regard, Mr. Yakiwchuk was present in the hearing room throughout the day and he did not testify on behalf of Local 18.

17. With respect to the assertion regarding the characterization by Ms. Fontana of the June 11, 2010 meeting date, counsel for the City stated that his notes did not reflect that Ms. Fontana made such an acknowledgement. Both counsel quite properly agreed that my notes would govern the disagreement on this issue. I have reviewed my notes very carefully and find no such reference by Ms. Fontana. However, the absence of such a reference in my notes does not really end this argument, because City's requests for the appointment of conciliation officers filed with

the Ministry have the same characteristic – the City notes that the parties met and bargained on June 11, 2010 and June 30, 2010, and makes no reference any phone messages or a discussion between Mr. Yakiwchuk and Ms. Fontana in April, 2010. Likewise, the written submissions filed by the City make reference at one point to bargaining having commenced on June 11, 2010.

18. The real question is whether the absence of a reference to the conversation in the materials filed by the City and these other references to June 11, 2010 ought to lead to the conclusion that the parties did not meet and bargain in April, 2010 because the City did not perceive the April, 2010 conversation to constitute meeting and bargaining. I do not believe that such a conclusion can be reached in the circumstances of this proceeding. This same issue arose in the *Danver Ambulance* case, where the Board noted, at paragraph 7, that counsel for the employer in reply argument expressed his scepticism at the union's position that what is now subsection 18(2) of the Act had been satisfied "in view of the union's statement on the application for a conciliation officer appointment that the parties had not held any negotiating meetings".

19. The Board did not find that argument to be persuasive in *Danver Ambulance*. I do not find it persuasive here. What laypersons (even laypersons with a long labour relations employment background such as Ms. Fontana) perceive to be significant for the purpose of the Act and what is legally significant for the purpose of the Act often do not align. As a result, the legal theories adopted by a party in any given proceeding may tend to change over the course of time. In fact, the documents filed with the Board by Local 18 and the ultimate position taken by it at the hearing reflect that same tendency – its assertion that there was no collective bargaining in June, 2010 was not pursued at the hearing.

20. Even if Ms. Fontana did not perceive her phone call with Mr. Yakiwchuk to have had any legal significance before or during July and August, 2010 when the pleadings and other materials were prepared and filed with the Ministry of Labour and with the Board, the Board ought not to just ignore the substance of the phone call and the legal effect of that call. As noted above, there was no objection made when Ms. Fontana testified regarding her April phone call with Mr. Yakiwchuk. Mr. Yakiwchuk was not called as a witness by Local 18, and therefore there can be no assertion that the testimony offered by Ms. Fontana on this question was inaccurate.

21. I find that the prerequisites for the application of subsection 18(2) of the Act to the circumstances of this proceeding are present. In light of that conclusion, it is not necessary to deal with the other arguments raised by the City at the hearing.

22. Accordingly, I advise the Minister of Labour that he does have the discretion to make the requested appointment of conciliation officers with respect to the renewal of the heavy engineering agreement and the residential agreement that expired on April 30, 2010, pursuant to subsection 18(2) of the Act.

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**1958-10-R; 2481-10-M** Elementary Teachers' Federation of Ontario, Applicant v. **District School Board of Niagara**, Responding Party v. Canadian Union of Public Employees, Intervenor; Elementary Teachers' Federation of Ontario, Applicant v. District School Board of Niagara, Responding Party v. Canadian Union of Public Employees and its Local 4156, Intervenor

**Certification – Interim Order – ETFO applied to represent a bargaining unit of designated early childhood educators – CUPE intervened in the application, asserting that it represented the DECEs in an all employee unit covered by a subsisting collective agreement – The status of the DECEs was the subject of an on-going grievance between CUPE and the school board in which the arbitrator had denied ETFO status to intervene – The issue for the Board was whether it should determine if the employees affected by the application for certification are covered by a collective agreement, or if an arbitrator should make that decision – ETFO asked for an interim order that would have the Board ask CUPE and the school board to adjourn their grievance pending the outcome of the application for certification – The Board held that its jurisdiction to determine the issue was parallel to the arbitrator's, with neither being superior to the other; the Board is not bound by any arbitration award – A proceeding before the Board best protects the natural justice rights of all the parties, including the employees, so the Board chose not to defer to arbitration – Interim ordered dismissed; matter continues**

**BEFORE**: *Brian McLean*, Interim Alternate Chair.

**APPEARANCES:** *Melissa Kronick, Harold Vigoda* and *Sara Guilmant-Fitzgerald* for the applicant; *Jean-Paul Alexandrowicz, Adrian DiLullo, Jim Morgan* and *Peter Doan* for the responding party; *Gavin Leeb, Frank Ventresca* and *Mark Luciani* for the intervenor.

**DECISION OF THE BOARD**: November 9, 2010

1. Board File No. 1958-10-R is an application for certification filed under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). Board File No. 2481-10-M is an application for an interim order.

2. These matters came on for hearing before me on November 3, 2010. The issue in these applications is, broadly speaking, whether the Board should determine if the employees affected by the application for certification are covered by a collective agreement or if an arbitrator should make that determination. The parties agreed that the facts were not in dispute and are as follows.

3. The Elementary Teachers' Federation of Ontario ("ETFO") is a trade union which represents elementary school teachers employed by various school boards across the province including the responding party. The Canadian Union of Public Employees is a trade union which through various local unions represents support staff employed by various school boards across the province. CUPE Local 4156 ("CUPE") represents the support staff of the employer District School Board of Niagara ("DSBN") in the following bargaining unit which has a term of January 1, 2009 to August 31, 2012:

> The employer recognizes the union as sole and exclusive bargaining agent for all employees of the district school board of Niagara in the district of Niagara regularly employed as office, clerical, technical and instructional support staff save and except [various exclusions deleted].

4. The province has recently amended the *Education Act* to provide for an early learning program which requires school boards across the province to provide full-day kindergarten for four and five year olds. In accordance with those amendments, the staffing for these classrooms is to be one teacher covered by the relevant ETFO collective agreement partnered with a designated

early childhood educator ("DECE") as defined in the *Education Act*. There is a province-wide contest regarding which union is to represent the large number of new employees required to fill the kindergarten DECE role.

5. In April 2010 CUPE filed a grievance against the DSBN claiming that the DSBN violated its collective agreement with CUPE by not posting the DECE positions. The assumption underlying the grievance was that the DECEs are covered by the CUPE collective agreement. The DSBN denied the grievance through the steps of the grievance procedure and CUPE asked the Minister of Labour to appoint an arbitrator to determine the grievance under s.49 of the *Labour Relations Act*. Arbitrator Nimal Dissanayake was appointed and commenced a hearing July 12, 2010. At the hearing ETFO sought intervenor status either on the basis that it represented affected employees (at least one DECE employee had signed an ETFO membership card) or on the basis of *amicus curiae*. The Arbitrator denied ETFO intervenor status in an award dated July 26, 2010. He also scheduled dates for the continuation of the arbitration proceedings on the consent of the two remaining parties for November 10, 18 and 23, 2010.

6. On September 17, 2010 ETFO applied for certification to represent the DSBN's DECE employees. CUPE intervened in the application and took the position that the application was untimely because, in its view, the DECE employees are covered by its collective agreement, a fact which it asserted would soon be confirmed by the Arbitrator. The employer took the position, consistent with its position on the CUPE grievance, that the CUPE collective agreement does not cover the DECE employees and therefore the application was timely. By decision dated September 24, 2010 the Board noted the parties' positions and directed a representation vote where employees could complete a ballot with a choice of representation by ETFO or no union. The Board also found that ETFO submitted membership evidence on behalf of 40% or more of employees in the bargaining unit, but nevertheless, ordered the ballot box sealed following the holding of the vote in view of CUPE's position that it already represented the employees concerned. The vote was held on September 28, 2010 and 24 employees cast ballots which were not counted since the ballot box was sealed.

7. The Board scheduled a hearing on the application for certification for November 3, 2010. At the time all issues were resolved save for a determination of whether the application is timely (which would be answered by a determination of whether the DECE employees were covered by the CUPE collective agreement) and counting the ballots. In advance of the hearing CUPE advised that it would take the position at the hearing that the Board should defer to the arbitration process regarding the issue of whether DECE employees are bound, rather than the Board engaging in that inquiry.

8. On November 1, 2010 ETFO filed the application for an interim order. The application asks the Board to order, on an interim basis, CUPE and the DSBN to request Arbitrator Dissanayake to adjourn the proceedings before him while the Board determines the application for certification (including the issue of whether the DECEs are covered by the CUPE collective agreement). DSBN supports the application. CUPE opposes it.

9. Based on the foregoing there are three interrelated issues before the Board at this time:

1) Should the Board defer the determination of the application for certification until the arbitration process concludes?

> 2) Should the Board make an interim order compelling the parties to adjourn the Dissanayake arbitration process?
>
> 3) Is the Board bound by arbitrator Dissanayake's determination regarding whether DECEs are covered by the CUPE collective agreement?

In my view, a decision on the last issue will go some way to answering the first two issues and so I start with issue #3.

*Is the Board bound by whatever determination the Arbitrator makes regarding whether DECEs are covered by the CUPE collective agreement?*

10. Both CUPE and the DSBN argue that the Board will be bound by the Arbitrator's award regarding whether DECEs are covered by the CUPE collective agreement. ETFO disagrees.

11. There is no dispute, however, that under s.7(1) of the Act the Board has the jurisdiction and indeed the obligation to determine whether the employees in the bargaining unit applied for are "bound by a collective agreement". This conclusion was confirmed by the Divisional Court in *Canadian Union of Public Employees, local 5167 v. Ontario Labour Relations Board*, [2002] September/October 976 at paragraph 24 where the Court stated:

> … Section 7 of the *Labour Relations Act* clearly required as a pre-condition to hearing the application, that the Board first find whether the scope of an existing collective agreement was binding on the paramedics. In deciding that issue, the Board had to give the wording of the collective agreement its ordinary meaning and only consider extraneous elements if the ambiguity of the language used required and justified resort to extrinsic evidence.

12. The starting point for CUPE and the DSBN's argument is s.48(1) of the Act which states:

> 48. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

13. Section 48(1) gives the Arbitrator statutory authority to interpret the collective agreement. Moreover, any decision he makes is binding on the parties and the employees covered by the collective agreement who are affected by the decision. Thus any award would be binding, by statute, on the union, the employees, and on the school board.

14. Both CUPE and the DSBN argue that this is significant. It means they cannot get out from any arbitration award (except through judicial review). This is undoubtedly correct. More than this, both argue that the Board cannot make a decision which is inconsistent with or undermines or effectively overturns any arbitration award which is ultimately issued by the

Arbitrator. For this proposition they rely primarily on the Ontario Divisional Court's decision in *Re Windsor Western Hospital Center Inc. and Mordowanec et al.* (1986) 56 O.R. (2d) 297. That case concerned a judicial review of a Board decision in which on a duty of fair representation application the Board found that the union and the employer engaged in illegal conduct which tainted an arbitration process. As a result the Board ordered that a new arbitration take place.

15. The employer applied for judicial review. Each member of the panel of three justices wrote his own reasons. Eberle J. wrote reasons, with which Holland J. concurred, which allowed the application and quashed the Board's decision. Saunders J. wrote a dissenting opinion.

16. In his reasons, Eberle J. stated:

> 47. … Inherent in the O.L.R.B. decision that there must be an arbitration to determine if the hospital had just cause for firing Mrs. Mordowanec was a determination that she did not resign. This determination in my view cannot be squared with the Palmer decision. The finding by the O.L.R.B. that the only remaining issue was whether Mrs. Mordowanec was dismissed for cause or not cannot co-exist with the Palmer finding that Mrs. Mordowanec resigned from her job. No question of dismissal could arise if, as Palmer held, she resigned. To me the questions of resignation and dismissal are mutually exclusive.
>
> 48. If the O.L.R.B. decision is to stand, we must recognize that it means the end of the Palmer decision, which the parties are bound by statute to recognize.
>
> 49. It seems to me that the O.L.R.B. has allowed itself to be too much influenced by the taint of illegality it saw in the resignation letter, and has too quickly gone on to conclude that it had jurisdiction to start the process over again; without addressing the real question of the statutory effect given to the Palmer decision by the Act. The existence of the Palmer decision raised a serious threshold question for the O.L.R.B. as to whether it could embark on a review of the question of whether Mrs. Mordowanec had resigned or been fired.

17. Eberle J. made reference to the decision of the Supreme Court of Canada in *Gendron v. Municipalite de le Baie James*, 1986 CanLII 62 (S.C.C.); [1986] 1 S.C.R. 401 and then concluded:

> 57. While recognizing that [what is now section 96] confers wide powers on the OLRB, I am unable to conclude that it authorizes the Board to override a final and binding decision of an arbitration award under [what is not section 48]. That is an authority given only to the Divisional Court, on an application for judicial review, and is an authority which that Court can exercise only if the Arbitration Board has exceeded its jurisdiction.
> 58. I am driven therefore to the conclusion that the jurisdictional power of the OLRB in [Section 96] is limited by the existence of a valid arbitration award, and that the OLRB lacks jurisdiction to override the decision of an Arbitration Board, given the existence of [section 48].

18. The facts in the *Windsor Western Hospital* case are entirely different from those before me. In particular the Court was concerned that the Board was effectively overturning the

arbitration award in that case. In the case before me, if both the Arbitrator and the Board make a determination on the issue before them, the Board's decision does not overturn the arbitration decision or affect it in any way. The Board certainly would not overturn the arbitration award or sit in review of the Arbitrator.

19. My conclusion is supported by the Ontario Court of Appeal's decision in *Canadian Union of Public Employees, Local 1394 v. Extendicare Health Services Inc.*, (1993) 14 O.R. (3d) 65 (C.A.). In that case, this Board had interpreted certain articles of a collective agreement within the context of an application by a union alleging a violation of the "freeze" provisions of the Act. Prior to the release of the Board's decision, the parties entered into a new collective agreement which left the language of the articles in question unchanged. The employer continued to administer the articles in a manner that was inconsistent with the Board's interpretation. The union grieved and took the position before the board of arbitration that the Board's interpretation was final and binding upon it. The board of arbitration dismissed the grievance. The union filed an application for judicial review. In upholding the decision of the board of arbitration, Doherty J.A. writing the majority opinion stated:

> I move now to the interpretation of s. 106(1). For convenience, I repeat the relevant part of the section:
>
> > 106(1). The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes. . . .
>
> For present purposes, the significant words of the section are "the action or decision of the Board thereon is final and conclusive for all purposes". The union contends that these words invest not only the ultimate decision of the Board with finality and conclusiveness, but give the same effect to the Board's interpretation of the collective agreement, since that interpretation was fundamental to the Board's ultimate decision.
>
> I cannot give that interpretation to the word "decision". The decision of the Board represents its determination of the complaint brought before it. The nature and scope of the decision is framed by reference to the complaint. The complaint alleged a breach of the freeze requirements of the Labour Relations Act and the Hospital Labour Disputes Arbitration Act. The Board concluded that the appellant had violated those statutory provisions and made a three-part order. Each part related to the breach of the statutory freeze period. The Board declared that the Acts had been violated, ordered that the violations cease, and directed that the employer compensate those affected by the violations. All parts of that order were final in the sense that they were the ultimate product of the complaint process. They were conclusive as between the parties in that they were not subject to challenge except by way of judicial review.
>
> In my opinion, nothing the arbitration board could do in settling the grievance placed before it could have any effect on any part of the Board's decision. The arbitration board was not concerned with whether the statutory freeze provisions had been violated, were continuing to be violated, or with any compensation order referrable [sic] to any such violations. Those matters

> were finally settled by the decision of the Board and no effect [sic] was made to relitigate them before the arbitration board.
>
> The union's argument requires that s. 106(1) be read as declaring that the Board's determination of questions of fact or law, such as the interpretation of the terms of a collective bargaining agreement, are final and conclusive as between the parties. That is not what the section says. It gives the board the power "to determine all questions of fact or law that arise in any matter before it" but it declares only "the action or decision" of the Board to be "final and conclusive for all purposes". The Board must make findings of fact and decide questions of law in arriving at its decision. Only the end product is, however, protected by the finality clause in s. 106(1).

Doherty J.A. went on to find:

> In Windsor Western Hospital v. Mordowanec, the Divisional Court considered the effect of the words "final and binding" contained in what is now s. 45, in relation to the remedial provisions of the Labour Board, and held that the Labour Board had no jurisdiction to override a final and binding decision of an arbitration board. The Divisional Court relied on Gendron v. Baie-James (Municipalité), [1986] 1 S.C.R. 401, 18 Admin. L.R. 121, sub nom. Baie-James (Municipalité) c. St-Arnaud, where it would appear that, notwithstanding a "final and binding decision" of a board of arbitration, the Labour Board could still exercise its remedial powers, but in the exercise of those powers it could not order a rehearing by the board of arbitration of whether an employee had resigned or been terminated, as the board of arbitration had decided this. See Mordowanec, supra, p. 313, citing p. 414 of Gendron.
>
> The case before us presents the converse situation. It is the parties to the decision which are bound, not the tribunal per se. The statute does not create a hierarchy of decision-making bodies but leaves each board free to exercise its power within the sphere allocated to it to resolve the disputes presented to it. The arbitration board, specified by the Act to resolve disputes between the parties under their collective agreement, asserted its own jurisdiction as it was entitled to do and interpreted the collective agreement.
>
> The Labour Board's expertise in interpreting the clause in the collective agreement was not greater than that of the board of arbitration. The expertise of the arbitration board was at least equal to that of the Labour Board (Dayco, supra, at p. 36):
>
> - [T]he expertise of a labour arbitrator is the interpretation of collective agreements, and the resolution of factual disputes pertaining to them.
>
> The action of the arbitrator does not directly interfere with any Labour Board order. There is no conflict of jurisdiction which would require that either the Labour Board or the board of arbitration refrain from exercising its jurisdiction in the interests of rationality.

20. In my view the Court's decision in *Extendicare* reinforces the conclusion that the Board and the Arbitrator exercise parallel jurisdiction over this issue. Neither is superior to the other.

21. The DSBN expresses concern that parallel inconsistent decisions would leave it in an untenable position. It creates the possibility that the DECEs would effectively be represented by two unions and the DSBN would have to go to court to resolve the situation (at best). First, I point out that the possibility of inconsistent decisions is an inherent, albeit unpleasant possibility in labour relations where parallel jurisdiction exists. Second, and more importantly, it appears s.99 of the Act (jurisdictional dispute resolution) could be engaged to resolve the situation. In this regard s.99(7) permits the Board to alter a bargaining unit determined in a certificate or defined in a collective agreement and s.99(9) permits the amendment of bargaining unit scope clauses where it appears bargaining unit descriptions conflict.

22. Finally, if the Board were to consider itself bound by the arbitrator's decision it would be fettering its discretion. This is a situation which falls squarely in the heart of the Board's jurisdiction. Section 7(1) obligates the Board to determine whether the employees affected by an application for certification are bound by a collective agreement. It would be a strange result for the Board to turn over that obligation to another adjudicator regardless of the statutory authority and expertise of that adjudicator.

23. For all the above reasons the Board is not bound by any arbitration award.

*Should the Board defer the determination of the application for certification until the arbitration process concludes?*

24. I note at the outset that although at least initially framed as a request to defer, CUPE is really asking the Board to adjourn the application for certification until an award issues in the arbitration proceeding. The parties made detailed argument on this issue but in view of my decision on the previous issue it is unnecessary to review these arguments in any detail. In my view the Board should not defer or adjourn for the simple reason that one of the parties before the Board, ETFO, is not a party in the arbitration case. In this case we have a contest between two unions. One relies on its collective agreement. One relies on the fact that it has organized a group of employees. The method of proceeding that best protects the natural justice rights of all the affected parties (including the employees), in the absence of ETFO's presence at the arbitration proceeding, is before the Board where all parties can be heard on the issue the Board must decide.

25. This is not to say that an arbitrator's ruling (including in this case) on whether a collective agreement covers a group of employees will be ignored by the Board. If an arbitrator three years ago determined that employees were in the bargaining unit, at a time when this was just a contest between CUPE and the Employer, the Board would almost invariably accept that as a definition of the bargaining unit boundary (especially if the collective agreement has been renewed since). Based on that evidence the Board would make its finding under s.7(1). But circumstances are different here given the representational contest that is occurring in this workplace.

*Should the Board make an interim order compelling the parties to adjourn the Dissanayake arbitration process?*

26. Given the findings above, the application for an interim order is dismissed.

27. In the absence of an agreement to permit ETFO to participate in the arbitration proceedings and an agreement that the result of those proceedings will be determinative of the issue under s.7(1), the Board will hold a hearing to make its determination under s.7(1) and otherwise determine the application for certification.

28. I am not seized. The matter is referred to the Registrar.

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**2388-09-U** Universal Workers Union, Labourers International Union of North America, Local 183 on its own behalf and on behalf of its Members and Executive Board, Applicants v. **Labourers International Union of North America**, Joseph S. Mancinelli, Ronald A. Pink, Q.C. and Cosmo Manella, Responding Parties v. Jack Oliveira and Luis Camara, Intervenors

**Alteration of Jurisdiction – Construction Industry – Intervenor – Practice and Procedure – Standing – Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues**

**BEFORE:** *Charles E. Humphrey*, Vice-Chair.

**DECISION OF THE BOARD**: December 16, 2010

1. This decision deals with three preliminary/procedural issues argued before the Board on December 2, 2010.

**Intervention**

2. Mr. Jack Oliveira and Mr. Luis Camara, both of whom are members of the Executive Board of the applicant, seek intervenor status in this application. Counsel for Oliveira and Camara filed an amended intervention with the Board on November 26, 2010. Their original intervention was filed in a related interim application proceeding on October 25, 2010. Counsel for Labourers International Union of North America, Mr. Mancinelli and Mr. Manella support the intervention as does counsel for Mr. Pink. The applicant says that Oliveira and Camara should not be permitted to intervene.

3. What is the basis upon which Oliviera and Camara claim they should be accorded intervenor status or given some level of standing in this application? The intervenors put forward essentially two basis of support for their claim to intervenor status or other standing:

i) their status as members of the Executive Board of Local 183 who dissented from the decision to bring this application; and

ii) their status as persons about whom statements are made in the application.

4. Counsel for the intervenors asserted in his submission that the Board's jurisprudence does not contain any cases factually "on all fours" with the facts in this case having regard to "the nature of the litigation, the identity of the moving parties, allegations of improper conduct and the remedial relief sought in this case". The Board agrees that the request for standing to intervene in this case does raise issues which are not typical of those faced by the Board in dealing with requests for standing to intervene. Indeed, the Board finds much of the Board's existing jurisprudence, some of which was referred to by the parties in argument as being of relatively little assistance in resolving these issues in the particular circumstances of this application.

5. Does the status of Oliviera and Camara as dissident members of the Executive Board of Local 183 provide support for their claim to standing as intervenors?

6. In pursuing this line of argument counsel for the intervenors referred to the fact that the application was brought on behalf of Universal Workers Union, Labourers International Union of North America, Local 183 ("Local 183") and "on behalf of its Executive Board". Oliviera and Camara dissented from the decision of the Executive Board to bring the application. It was argued that as dissenting members of the Executive Board they had a separate status to intervene. In the Board's view this position misapprehends the significance of the reference to the Executive Board in the style of cause and the significance of Oliveira's and Camara's dissent.

7. In the Board's view the reference to the Executive Board in the style of cause is redundant. The Executive Board is simply part of Local 183; it does not have, for purposes of these proceedings, an existence separate from Local 183. It is simply part of the governing structure of the institution that is Local 183; it is not a separate entity.

8. In the Board's view the fact that Oliviera and Camara are members of the Executive Board does not elevate the significance status of their dissent. This application has been brought and prosecuted by the institutional entity – Local 183. It is quite possible that there are a number

of members who do not agree with that decision. Indeed, any decision that Local 183 makes is not likely to find favour with all of its members. Given the political nature of trade unions it would be surprising if that was not the case. As democratic institutions trade unions provide internal channels for expressing disagreement with decisions made by the institution. These channels include procedures and protections under union constitutions, and periodic elections. Where a decision to engage in litigation has been made by a union it would be difficult to imagine a case where the Board would be prepared to allow a dissenting member to intervene in an application brought by his or her union. Absent an allegation of a violation of the Act relating to a decision the Board, as an adjudicative body, does not inquire into how parties appearing before it have decided that they will bring an application. These are internal matters, governed by internal processes whether the institutional entity is a trade union or a corporation.

9. There are sound policy reasons for not allowing dissident members of a trade union to intervene in matters being pursued by the union of which they are a member. If trade unions are to effectively carry out the rights and responsibilities they are given under the Act they must be able to pursue what the institution perceives to be in its interest through litigation without interference in the process from those who wish to express dissent with the decision made by the institution. Where a union has, through its internal processes, decided to pursue litigation to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out is responsibilities and exercise the powers that it is given under the Act. Such a result is not in the interest of unions or their members.

10. In the Board's view the fact that Oliveira and Camara were members of the Executive Board who dissented from the decision to pursue this application does not provide support for their standing to intervene. In the Board's view they are simply members who disagree with a decision made by the institutional entity, Local 183. As members of the Executive Board they had a greater opportunity to attempt to affect the decisions made by Local 183. However, once the decision was made by Local 183 their status as Executive Board members did not elevate the status of their dissent above that of any other member who disagreed with the decision taken. They simply are members who disagree with the institution's decision. The policy reasons which make the Board reluctant to allow interventions by an institution's members which in effect seek to question in pubic the internal decision made by the institution apply to Oliveira and Camara as they do to all members of Local 183.

11. Does the status as a person about whom statements are made in the application support the claim of Oliveira and Camara for standing to intervene?

12. In dealing with this issue regard must be had to the statutory context of this application. The applicants' claim that the responding parties have acted contrary to sections 76, 87(2), 147 and 149 of the Act. The main focus of the application is section 149. As the Board has already noted this section deals with the relationship between institutional entities, parent unions and local trade unions. The section does not regulate the conduct of individuals or the affect of the conduct of individuals except to the extent that the conduct or affect of the conduct can be said to be conduct of a designated institution or result in an effect on a designated institution. Similar statements can be made about section 147 which deals with alteration of a local trade union's jurisdiction by the parent local.

13. Were it not for the content of a limited number of paragraphs in the pleadings the Board would consider the status of Oliviera and Camara to simply be persons who might be called to give evidence. In such circumstances they would not be given standing to intervene. However, certain of the pleadings, in the Board's view, provide a basis for granting them limited standing.

14. Paragraph 252 of the consolidated application reads as follows:

> On October 6, 2010 Mr. Pink signed 'charges' against, and sent copies by email to, Mr. Terceira, Mr. Avero, Mr. Melo, Mr. O'Brien and Mr. Strazzanti: **Tab 289 A, B, C, D, and E.** Mr. Pink purports to bring the charges pursuant to Section 10(2) of the *Code* **(Tab 2)**. The charges are virtually identical. Mr. Pink did not bring any charges against Mr. Jack Oliviera or Mr. Luis Camerra, two other members of Local 183's Executive Board. Mr. Oliviera and Mr. Camerra have been loyal to Mr. Pink and Mr. Mancinelli and have assisted Mr. Mancinelli and Mr. Pink. (emphasis added)

15. In other places in the pleadings in particular paragraphs 274 and 294 reference is made to a claimed loyalty of Oliviera and/or Camara to Mr. Pink and Mr. Mancinelli. However, it is paragraph 252 which is of greatest significance in determining the issue of standing for Oliviera and Camara.

16. In this application the applicants have, in summary, claimed that Mr. Pink and Mr. Mancinelli along with the international union have conspired to use Mr. Pink's powers as Special Counsel – Canada for purposes that involve violations of the sections of the Act identified in the application. When in paragraph 252 the applicant pleads that Oliviera and Camara "have been loyal to Mr. Pink and Mr. Mancinelli and have assisted Mr. Mancinelli and Mr. Pink" this can only be taken as a claim that Oliviera and Camara were part of the alleged conspiracy in which Mr. Pink and Mr. Mancinelli are claimed to have been engaged. That is, that they assisted Mr. Pink and Mr. Mancinelli in carrying out what are alleged to be improper activities which constitute violations of the Act. In these circumstances, while there is no relief claimed against the intervenors their reputation is put in issue in a way analogous to the situation faced by Arbitrator Kaplin in Re the Crown in Right of Ontario (Ministry of Transportation) and Ontario Public Service Employees Union, [1994] 43 L.A.C. (4th), where he gave standing to persons identified in union particulars relating to claims of discrimination and harassment. Like the persons identified in that case, it is the view of the Board that, in the particular circumstances of this case, Oliviera and Camara have a reputational interest to protect, an interest which, to use the words used by Arbitrator Kaplin, is vital, direct and compelling. The applicants have put the reputation of Oliviera and Camara into question by in effect suggesting that they were part of a conspiracy against the interests of Local 183, the organization in which they play a leadership role. Their interest in protecting their reputation is unique to them; they cannot reasonably be expected to rely on the parties to the application to protect their interest.

17. Having regard to the foregoing, the Board is satisfied that Oliviera and Camara should be given limited standing in these proceedings to protect their reputational interest given the unique circumstances of this case. The Board wishes to be clear that it is exercising its discretion to give the intervenors standing for a limited purpose only. The Board is not, by this decision, giving the intervenors standing as a full party to the proceedings. Oliviera and Camara's participation in this application will be limited to the following:

> 1) They may ask questions, introduce evidence and make argument relating only to matters that go directly to their personal reputational interest.
>
> 2) They do not have standing to raise issues, introduce evidence or make argument relating to any matter or issue that does not directly relate to their reputational interest.
>
> 3) In particular they have no standing to raise issues, introduce evidence or make argument relating to the authority of Local 183 or its Executive Board to initiate or pursue this application.

**Motions**

18. Counsel for Mr. Pink raised several preliminary issues by way of a letter dated October 21, 2010. The first of those issues relates to a number of paragraphs in the consolidated application which counsel says should be struck on the basis that, "even if the facts are proven to be true, they are irrelevant to the allegations of interference". In addition, counsel indicated a concern that it was difficult for his client to determine how to respond to the facts pled in the paragraph he identified in his letter or they did not appear to relate to any allegations of misconduct. Because of this, he said, he and his client were left trying to guess the significance of the particular pleadings.

19. The Board is not prepared to strike the paragraphs referred to in counsel's letter. The Board is not satisfied that the statements are not at least arguably relevant to the narrative of facts upon which the applicant relies. As counsel for the applicant pointed out in his argument many of the paragraphs which Mr. Pink's counsel refers to in his letter are connected with other parts of the pleadings about which there is no objection. Deleting the paragraphs referred to would, in some cases, affect other parts of the pleadings, in some cases rendering other parts of the pleadings meaningless.

20. One of the sets of paragraphs of the pleadings which Mr. Pink's counsel seeks to have struck are those relating to Mr. Pink's retainer by Halton Forming. The Board is not prepared to strike these pleadings. The Board does recognize the concern raised by counsel regarding solicitor/client privilege issues which may arise regarding the facts pled relating to Mr. Pink's representation of Halton Forming. However, it is not clear to the Board at this stage whether and to what extent those issues may arise as the case proceeds. That is, it is not clear to the Board whether or not the inquiry will involve the disclosure of information protected by solicitor/client privilege. In the Board's view this issue is best dealt with in context when and if it arises in the course of hearing the case.

21. Counsel also sought a direction from the Board regarding the following paragraph found in the consolidated application:

> B) ….
>
> 1. During the Trusteeship, LIUNA hired Soavé Strategy Group (public relations, strategy development, etc.). In June 2007, Local 183 received an invoice from SSG for $10,600. This included Mr. Mancinelli's trip to Italy to receive an honour for his father. Local 183 subsequently

> received an invoice for 5 months work (October 2007 to February 2008). Mr. Pink approved the invoices. (paras. 25-31)

22. Counsel asks that the applicant be required to give evidence relating to the facts alleged in this paragraph before the responding party Mr. Pink gives evidence relating to these facts. Counsel argue this approach should be taken because the allegations are peripheral to Mr. Pink's investigation, he has no or minimal knowledge of the allegations, he should not have to prove what he has not done.

23. The Board's view is that there is no reason to treat this particular paragraph in a manner different than any of the other pleadings. The Board has determined that Mr. Pink should give evidence first. The Board in its decision of May 13, 2010 dealing with the issue of order of proceeding made it clear that in requiring Mr. Pink to proceed first it was not making any determination regarding evidentiary onus or onus of proof. Rather, its decision was based on practical consideration of efficiency in hearing the case. In responding to the facts alleged in this paragraph all that is expected of Mr. Pink, if he considers it necessary to respond to the facts pleaded in the paragraph, is to provide what information he has based upon the facts as pleaded on their face. If after hearing the evidence of the applicant relating to the facts alleged there is addition reply evidence he wishes to provide he may take that opportunity.

24. Counsel for Mr. Pink also sought the following direction from the Board:

> C) The Responding Party will move for an order and/or a direction that he is not required to provide proof on the merits of each charge, but is, rather, required to offer evidence of the reasons he initiated and pursued his investigation, and, once the investigation was concluded, determined that it was advisable to bring charges.

25. Counsel is in effect asking the Board, in advance of hearing evidence or argument in this application, to limit the case that can be put forward by the applicant. That is, to predetermine that meeting the just cause standard under section 149 does not require the responding party to deal with the merits of the charges that were laid against certain individuals following the completion of Mr. Pink's investigations.

26. Counsel for Mr. Pink may well be correct in his assertions regarding the nature and extent of the case that Mr. Pink should be required to meet. That is, providing evidence as to the reasons why Mr. Pink engaged in the investigation and laid charges as opposed to having to defend the merits of the charges. Counsel is entitled to his theory of the case just as the applicant has its theory of the case. Whatever merits they may be to the position put forward by Mr. Pink's counsel regarding the case Mr. Pink needs to meet, the Board cannot make a determination of that issue in advance of hearing evidence and argument. This does not mean Mr. Pink must introduce evidence relating to the merits of the charges. Counsel must make that decision based on his view of the case. These are adversarial proceedings, all counsel will in the course of presenting their case have to make judgements about what evidence they introduce and what arguments they make, that is the nature of the process. In the Board's view it would be neither appropriate nor fair for the Board to make the kind of pre-determination of this issue requested by counsel for Mr. Pink.

27. Counsel for Mr. Pink also sought a direction from the Board that Mr. Pink "is not required to provide evidence regarding all telephone calls made by him or to him as alleged in the pleadings". Counsel is referring to, on the Board's count, 83 references made in the consolidated application to phone calls made from or to Mr. Pink's telephone. In almost all cases the allegation simply is that a phone call was made or received. Facts relating to events surrounding the time of the phone calls are pleaded but generally the connection between the events and the phone calls is not made explicit in the pleadings. Counsel for Mr. Pink argued that given the bald claim of a phone call having been made or received it is difficult for his client to determine the relevance of the pleading regarding the call and what is required of Mr. Pink to respond to the pleading. Counsel's concern is understandable and reasonable. In responding to counsel's concern the Board must have regard both to counsel's reasonable concern and the right of the applicant to pursue its case.

28. At this stage the Board is not prepared to make a ruling on this issue; rather the Board considers it appropriate to provide guidance to the parties and deal with specific issues as they arise in the proceeding. In this regard the Board notes that the pleadings as they relate to phone calls provide little in the way of facts requiring a response by Mr. Pink. Unless he denies that a call was made there is little for him to say unless there is something in the context of the facts surrounding the call which leads him to the conclusion that a more comprehensive comment is warranted and possible. Mr. Pink may of course be subject to cross-examination about the calls. Should evidence be introduced by the applicants relating to the calls the Board will take a flexible approach in allowing Mr. Pink to introduce reply evidence.

29. This application involves challenges for the Board and the parties. The application involves the review of an ongoing process. The application has evolved since the initial filing. The pleadings have grown in length and complexity. The positions of the parties have evolved as events have unfolded. The Board's existing jurisprudence provides limited assistance in resolving some of the most important issues raised by the application. Given these challenges it is the Board's view that the Board must be flexible and responsive to the difficulties the parties face in prosecuting their case and defending their position. This case is different than most the Board deals with and requires application of rules or procedures in ways that take into account the challenges faced by the parties. Consistent with the Board's interest in ascertaining the truth in a way that respects the interest of all parties in fairness and natural justice the Board intends to do what is necessary and appropriate in managing this litigation to avoid parties being disadvantaged by rulings relating to order of proceeding or by the nature and extent of pleadings.

**Particulars – Response of Mr. Pink**

30. The Board heard argument on December 2, 2010 relating to the applicants' claim that Mr. Pink's response to the application had failed to particularize his basis for initiating the investigation.

31. On March 29, 2010 counsel for Mr. Pink filed consolidated pleadings on behalf of his client. In a letter dated April 7, 2010 counsel for the applicant took the following position regarding the consolidated pleadings filed on March 29:

> First, the Responding Party, Mr. Pink appears to have taken the requirement to file consolidated pleadings as an opportunity to file a response that ought to have been filed initially. Having said that, he has failed to particularize any

> basis for initiating his 'investigation' alleging only that he "received communications at that time from sources regarding Local 183" (paragraph 21) and that he "had received information from informants and certain individuals connected with Local 183 alleging various improprieties" (paragraph 28). These pleadings fail to meet the bare minimum threshold of pleading material facts upon which Mr. Pink will rely and Local 183 objects to Mr. Pink attempting to rely on or allege there was any basis for his investigation.

32. By way of decision dated October 8, 2010 the Board directed the responding parties to file revised consolidated proceedings by November 2, 2010. Counsel for Mr. Pink filed new consolidated pleadings on November 2, 2010. On November 11, 2010 counsel for the applicant wrote to the Board complaining that "Mr. Pink continues to fail and/or refuse to plead any facts that could justify his investigation or actions". Counsel in his letter provided examples of parts of the pleadings which counsel said were not sufficiently particularized. The Board in its decision of November 26, 2010 directed the applicant to advise Mr. Pink's counsel by November 26, 2010 exactly what particular it was claimed should be provided. Counsel provided such a letter to Mr. Pink's counsel listing 32 paragraphs in the consolidated pleadings that lacked sufficient particulars.

33. At the hearing on December 2, 2010 counsel for Mr. Pink advised the Board and the parties that his client was prepared to provide the particulars requested in applicant counsel's letter of November 26, 2010. Counsel for the applicant took the position that compliance with the requirement to provide particulars had come too late and Mr. Pink should be prohibited from introducing evidence relating to the factual pleadings that had not been properly particularized. Counsel argued that the responding party had made a strategic decision not to provide particulars and should bear the consequences of that decision.

34. The Board's Rules of Procedure require that any response must include among other things:

> **7.5** Any response filed with the Board must include the following details:
>
> ...
>
> (d) where the responding party relies on a version of the facts different from the applicant's, a detailed statement of all material facts on which the responding party relies, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.
>
> ****
>
> **2.4** No person will be allowed to present evidence or make any representations at any hearing or consultation about any material fact relied upon which the Board considers was not set out in the application or response and filed promptly in the way required by these Rules, except with the permission of the Board. If the Board gives such permission, it may do so on such terms as it considers advisable.

35. The Board is satisfied that the consolidated pleadings filed by counsel for Mr. Pink on November 2, 2010 did not satisfy the requirements of Rule 7.5(d) as they relate to his basis for initiating the investigation. The issue then is, should the Board exercise its discretion and allow the filing of the particulars.

36. Counsel for the applicant argued strongly for the position that Mr. Pink should be precluded from introducing evidence relating to the insufficiently particularized pleadings. The history outlined above does provide some support for the applicants' position, however, in all the circumstances, the Board is of the view that it should exercise its discretion to allow Mr. Pink to file and rely on the particulars he has agreed to provide. In reaching this conclusion the Board has considered the following:

1) Mr. Pink promptly agreed to provide particulars when presented with a specific request of particulars required.

2) While counsel for the applicants argued that his clients would suffer prejudice as a result of the delay in providing particulars, the Board is not satisfied that as a practical matter there will be any significant prejudice to the applicants given the nature of the particulars being provided and the timing of their production.

3) The Board is of the view that it is appropriate in the particular facts of this case for it to consider the broader labour relations implications of not allowing the facts and evidence in question to be introduced. The matters before the Board in this application may not only affect the direct parties to the proceedings but the applicants' membership. As well the ongoing relationship between the parent union and the local are also likely to be affected by the outcome of this application. In these circumstances, it is the Board's view that it is not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance within procedural requirements, in the absence of any significant prejudice to the applicants. This is not a case where the consequences of non-compliance would only affect the party who has not complied. In this case, in the Board's view, there are sound labour relations reasons for allowing the particulars to be provided and relied on. Given the issues involved in this case and its impact on the direct parties and others, the Board is of the view it is important that any decision issued by the Board be based on a full consideration of the relevant facts.

37. Having regard to the above, the particulars requested in the letter dated November 26, 2010 from counsel for the applicants are to be provided to counsel for the applicants and the Board by January 5, 2011.

**3887-07-R; 0030-08-U** International Union of Painters and Allied Trades, Local 1891, Applicant v. **Mimico Group Inc.**, Responding Party; International Union of Painters and Allied Trades, Local 1891, Applicant v. Mimico Group Inc., Responding Party

**Certification – Construction Industry – Employer – Unfair Labour Practice – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed**

**BEFORE:** *Mark J. Lewis*, Vice-Chair.

**APPEARANCES:** *Graham Williamson* and *Greg Smith* appearing for the applicant; *Herbert Law, Jorge Pereira* and *Vic Vetro* appearing for the responding party.

**DECISION OF THE BOARD:** November 17, 2010

1. As set out in the Board's decisions dated April 2 and May 21, 2008, OLRB File No. 3887-07-R is an application for certification in the construction industry which the applicant has elected to have dealt with pursuant to the provisions of section 128.1 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act"). This application was filed on March 25, 2008.

2. OLRB File No. 0030-08-U is an application filed under section 96 of the Act in which the applicant alleges that the responding party has violated various sections of the Act, including by laying-off/terminating certain individuals that it claims were at work in the bargaining unit applied for in its application for certification. Notwithstanding that this section 96 application makes reference to, and relies on, various events which allegedly occurred in the days immediately surrounding the date of application in OLRB File No. 3887-07-R (March 25, 2008), the applicant has not sought to convert its application for certification to one dealt with pursuant to section 8 of the Act and/or sought remedies under section 11 based on the responding party's alleged violations of the Act.

3. Following the Regional Certification Meeting held for OLRB File No. 3887-07-R on April 30, 2008, the employee status of all twelve of the individuals that either the applicant or responding party asserted were at work, in the bargaining unit, on the date of application remained in dispute.

4. Specifically, the applicant maintained its challenges to the status of the following nine individuals on the basis that they were not at work, and/or were not performing bargaining unit work, on the date of applications:

(a) Romolo Bucci
(b) Kelly Cabeguin
(c) Richard Castro
(d) Roy Chinn
(e) Jason Lombardi
(f) Tony Lombardi
(g) Fernando Rego
(h) Pedro Sousa, and
(i) Scott Hunter (who the applicant also challenges on the basis that he is a managerial employee pursuant to section 1(3)(b) of the Act).

5. The applicant maintained its position that the following three individuals were employees of the responding party who were at work, performing bargaining unit work, on the date of application:

(j) Jed Fagerlund
(k) Kevin Holditch, and
(l) Shawn Tabor.

6. The responding party asserts that Fagerlund, Holditch and Tabor were not its employees, but were rather employees of one of its subcontractors, Carlos Melo, or were employees of a subcontractor to Melo, Don Benoit. Further, it also disputes that these three men were performing bargaining unit work (drywall taping) on the date of application, in any event. Finally, the responding party asserts that the other nine above named individuals, whose status has been challenged by the applicant, were its employees and were at work, performing bargaining unit work on the date of application.

7. As set out in the Board's May 21st decision, in view of the various issues in dispute and the positions of the parties concerning those issues, it was determined that the Board would initially deal with the employee status of Fagerlund, Holditch and Tabor and the section 96 application which relates to their layoff/termination. On the first day of hearing, however, the Union clarified that it was no longer alleging that Fagerlund had been terminated in violation of the Act. With respect to these issues, the Board heard evidence from six witnesses. Carlos Melo and Jorge Pereira testified for the responding party while Don Benoit, along with Fagerlund, Holditch and Tabor, testified for the Union. This decision relates to the status of the Union's three additions to the list of employees and its section 96 application.

## Background

8. Some of the facts relevant to the issues (to be determined first) in this matter were not in dispute but a large proportion of additional *facts* were either directly in dispute or were somewhat vague and unclear.

9. The responding party, Mimico Group Inc. ("Mimico"), is a small to middle sized general contractor carrying on business in the ICI sector of the construction industry in and around Toronto. Certainly as of 2008, a large proportion of Mimico's business involved building new, and extensively renovating existing, Tim Horton's/Swiss Chalet/and/or Harvey's outlets for CARA Operations Ltd. There is no dispute that, in March 2008, Mimico was the general contractor responsible for building a new Swiss Chalet/Harvey's outlet on Burloak Drive in Oakville, Ontario. This project required drywall taping to be performed and there was no dispute that Fagerlund, Holditch and Tabor all performed taping at this location.

10. The evidence as to whether any or all of these three men were at work, performing drywall taping (and therefore bargaining unit work), on the date of application was somewhat confused. I do not believe that this confusion was the result of an attempt to mislead the Board by any of the witnesses but was rather the result of the imperfect memories of these witnesses with respect to exactly what occurred on any particular days, some months prior to them giving testimony. Despite this somewhat confused situation, I find that it is more likely than not that all three men were at work, performing bargaining unit work, on the Burloak project on the date of application, March 25, 2008.

11. Further, to the extent there was ever any serious doubt, I find that Fagerlund, Holditch and Tabor were all employees under the provisions of the Act when working on this jobsite. All three men were paid for their work individually and on an hourly basis. The supplies, materials and equipment they used were all provided to them. Accordingly, they had no prospect of profit or loss in relation to their work. Their supply of certain basic hand tools, along with the facts that there appears to have been some flexibility concerning their working hours and that they required only limited supervision, are simply a result of their status as skilled tradesmen, as opposed to being indicia of independent sub-contractors. In short, on this site these three men were not engaging in any form of entrepreneurial activity and they were, in substance if not actually in form, *employees* under the Act in every possible way.

12. Given my conclusions that Fagerlund, Holditch and Tabor were all employees (under the Act) who were performing bargaining unit work on the date of application, the only real question to be answered with respect to the employee status of these three men, in the context of the application for certification, is - who was their *employer* on the Burloak site? As noted above, the parties set out three possible answers to this question. The Union asserted that the employer was Mimico. Conversely, Mimico argued that it was definitely not the employer and that, therefore, Fagerlund, Holditch and Tabor must have been employed by either Melo or Benoit on the date of application.

## Legal Analysis

13. The question of which entity is the employer of a particular employee (or a particular group of employees) for the purposes of the Act is one that occurs frequently in the context of applications for certification in the construction industry. Accordingly, there was no dispute between the parties concerning the legal analysis to be used in the determination of this matter. Specifically, and as all of the cases relied upon by both parties establish, in such situations the Board analyses the particular facts of the case at hand in relation to a number of factors. The factors the Board has applied in determining who is the employer for labour relations purposes are set out in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645 as being:

1. The party exercising direction and control of the employees performing the work;
2. The party bearing the burden of remuneration;
3. The party imposing discipline;
4. The party hiring the employees;
5. The party with authority to dismiss the employees;
6. The party who is perceived to be the employer by the employees;
7. The existence of an intention to create a relationship with an employer and employees.

14. The Board has not found any of the above listed factors to be determinative, but has, generally, ascribed greater weight to certain of them (than others). In this respect, in *533670 Ontario Ltd. (c.o.b. Best Personnel Services)*, [1997] OLRB Rep. September/October 849, the Board described its approach in the following terms:

> 13. None of these [the York Condominium] factors is necessarily determinative, and the relative significance of any individual factor will depend on the circumstances of the particular case. Having said that, it is apparent that the object of the exercise is to assess the various factors, both individually and in the context of all the other factors, in order to ascertain who has fundamental control over the employment relationship, particularly where the factors point in different directions. In making the assessment and determination, the Board is more concerned with substance than with form; that is, the Board will not permit commercial form to obscure labour relations reality.
>
> 14. A natural consequence of this is that the first five factors listed in *York Condominium, supra*, which are indicators of control, have become more important than the last two, which are both more subjective and difficult to gauge. This is consistent with the Board's preference (and the underlying theme of the Act as demonstrated by provisions like subsection 1(4) and section 69) for substance over form, and with the principle that perception and impression cannot be determinative of a question of law (see, *International Union of Canada and Kent Line Ltd.*, (1972) 27 D.L.R. (3d) 105 (Federal Court of Appeal).
>
> 15. When it comes to a question of fundamental control, there is little which is more important than beginning the relationship (hiring), regulating it (direction, control and supervision) and ending it (termination). Accordingly, *York Condominium, supra,* factors 1, 4 and 5 have gained primacy. Indeed, even though the Board (and arbitrators) have been careful to say that it will not necessarily be determinative, decisions like *Dare Personnel, supra, Sylvania Lighting, supra,* and *Royal Ontario Museum, supra,* demonstrate that direction and control is a very significant factor. At the same time, these decisions also demonstrate that the perception of the employees, and commercial contracts as indicators of intention often carry little weight.

15. There is no question that the importance assigned to any one (and indeed to any combination) of the factors used by the Board in its overall assessment will vary with the circumstances of each case. However, and as the above set out passage from *Best Personnel Services, supra,* makes clear, in assessing whether a particular responding party is the true employer of the employees in question, what must ultimately be determined is whether it (or some other entity) exercises fundamental control over the employees' working lives. Further, the Board

has made it clear that the assessment of *fundamental control* should be made within an *overall context.* For example, in *Monarch Corporation,* 2008 CanLII 2593 (ON L.R.B.), the Board stated:

> 20. The assessment of whether Monarch or the intervenor exercised fundamental control over the construction labourers who were assigned to work at the Monarch site requires an evaluation of not just how they perform their work from day to day, but an overall assessment of their employment relationship beginning with how they came to be working at that site and considering not only the contractual or formal arrangements under which they were employed, but the entire context of the relationships between the employees and Monarch and the intervenor and between Monarch and the intervenor.

### The Employer

16. One of the three possible *employers* can be quickly eliminated as, based on all of the evidence, it is readily apparent that Don Benoit was not, and has never been, the employer of these three men. As of March 2008, he was not a contractor, or even an employee, in the drywall taping industry. He was, and still is, a full-time paid representative of this Union. In this capacity, that of a representative whose duties include organizing activities, Mr. Benoit was very much instrumental in getting Fagerlund, Holditch and Tabor work on this Mimico jobsite (along with, in the case of Holditch and Tabor, prior work on another Mimico site in Kitchener). However, the fact that he may have helped *place* them on this site in no way makes him their employer. Benoit did not direct or supervise these men, hire or lay them off, or in any other way control anything they did on the Burloak project. He did not pay them or in anyway profit financially from their labour. Put simply, the mere fact that Benoit may have given Mimico and/or Melo the impression that he was a taping contractor, as part of his attempt to *salt the job,* does not make this clearly false proposition true. Accordingly, the actual employer of Fagerlund, Holditch and Tabor, on March 25, 2008, must have been either Mimico or Melo.

17. As is the case in most of the Board's more recent decisions, in reaching my ultimate conclusion in this matter I am not prepared to attach any significant weight to the intention of either Mimico or Melo to create an employer/employee relationship or the perceptions of Fagerlund, Holditch and Tabor as to who their employer was. These two factors are often *self-fulfilling prophesies* given that they are inherently subjective and have a tendency to emphasize the form of the relationships at issue rather than their true substance. Further, I believe that in this case these two factors are of even less significance than they might normally be because of the natural, if subconscious, tendency of the various witnesses to attempt, with the benefit of hindsight, to recast, what were clearly somewhat confused and random, events in an organized and structured fashion in order to support of their own party's fundamental positions.

18. Further, another of the *York Condominium* factors can be dealt with very easily. None of these three men were ever disciplined while they were working on the Burloak jobsite. Accordingly, *the party imposing discipline* is a neutral factor in this case.

19. The evidence concerning how these three men came to be hired to work on the Burloak jobsite is, to put it simply, *a morass of confusion.* To some extent, and by the Union's own admission, this confusion was the result of the deliberate actions and statements of Benoit which, although clearly legal and proper, were nevertheless, deliberately designed to get Mimico to hire

the drywall tapers who he referred to it, without Mimico realizing that it had done so. Further, besides the *misdirection* engaged in by Benoit, such confusion was compounded by a tendency of all of the principle actors in this matter to leap to certain conclusions and essentially believe what they wanted to believe, without definitively clarifying certain statements and/or actions which were capable of bearing multiple interpretations.

20. As noted above, the Burloak jobsite was not the first Mimico jobsite which Holditch and Tabor (but not Fagerlund) worked on. Prior to starting work in Oakville, both of these men had worked on a Swiss Chalet renovation project which Mimico was performing in Kitchener, Ontario. They were sent to that jobsite, in order to perform drywall taping work, by Benoit.

21. This initial referral (of Holditch and Tabor by Benoit) had come about as a result of Benoit's willingness to pursue (and in some senses to create) organizing opportunities. Simply put, Benoit had been passing by the Burloak jobsite as part of his normal work duties, when he decided to stop and see who was doing the drywall taping on that job. On the Burloak site he spoke to Melo, who was installing metal studs and/or drywall boards, and who advised him that no tapers were required for that job right then but that some might be needed on a different job. Specifically, depending on whose evidence is considered, Melo either told Benoit to call Jorge Pereira, Mimico's president, or told him to go and check Mimico's Kitchener Swiss Chalet project. However it came about, Benoit and Pereira eventually got in touch with each other and ended up meeting on the Kitchener site. The upshot of their meeting was that Benoit agreed to supply some drywall tapers for this project. There is no question that, initially at least, Pereira believed that the tapers to be supplied would be employees of Benoit, who was to act as a taping subcontractor for Mimico (there being no specific drywall subcontractor for the Kitchener project). However, as noted above, giving Mimico this impression was simply a ruse, executed by Benoit, in order to salt the job.

22. As a result of the Pereira/Benoit agreement, Benoit called Holditch and Tabor, who were union members and who were unemployed at the time, and told them to report for work on the Kitchener jobsite. When they got there they reported to *Pedro*, Mimico's foreman who was supervising all of the direct employees of Mimico on this site. Thereafter, it was always Pedro who instructed them on what work had to be done. Holditch and Tabor, along with a third taper, Mike Repuszka, worked on this jobsite for approximately 2 weeks. They gave records of their hours to either Pedro or Pereira and were subsequently paid by Mimico, by cheques given to them by Pereira, at the rate of $25 per hour, which was the hourly rate that Benoit and Pereira had previously agreed to for taping work on this jobsite.

23. There was a great deal of confusion and disagreement concerning how Fagerlund, Holditch and Tabor thereafter ended up working on the Burloak jobsite. However, whether they were sent to this jobsite by Benoit, Pereira and/or Melo ultimately makes little difference to the overall analysis. What is clear is that, shortly before finishing work on the Kitchener jobsite, Holditch and Tabor became aware that there would soon be taping work available in Oakville. After a brief period off work, they were told by Benoit, Pereira or Melo (and possibly by more than one of them) where and roughly when to report. Regardless of who told them to go to Oakville, there was no evidence that Pereira or Melo ever directly said that Holditch and Tabor would be working for Mimico on the Burloak site but it is clear that both tapers were aware that this was a Mimico project.

24. When Holditch and Tabor got to the Burloak jobsite they were met by Melo. At all times thereafter it was Melo who directed and supervised their work (along with the work of most of the other persons performing drywall work on this site). Further, after a few days, Melo requested that they bring more tapers with them and, accordingly, Fagerlund, amongst others, also began doing taping work on the site.

25. In these circumstances, and based on the evidence I heard, I find *hiring* to be at best a neutral factor. Holditch and Tabor were clearly, if somewhat unintentionally, hired for the work in Kitchener by Pereira on behalf of Mimico. However, the situation in Oakville was obviously different. Specifically, when Holditch and Tabor came to present themselves for work on the Burloak site it is absolutely clear that it was Melo who met and, at all times thereafter, directed them. Further, it was Melo who instructed them to find more men, which resulted in Fagerlund coming to work on this site. Melo never actually told any of these tapers that he was the drywall subcontractor for the site (as opposed to being a Mimico site foreman as Pedro was in Kitchener). However, it must also be remembered that, at the time, Melo was under the genuinely held, although obviously wrong, impression that the tapers were employees of Benoit, who he had met with (again), and come to an arrangement with, on the site shortly before the taping work started and who he believed to be a taping subcontractor. In these circumstances, it would appear that both Pereirra, on behalf of Mimico, and Melo, on his own behalf, had a part in *engaging* all three of these men, along with some of the other drywall tapers that worked on this jobsite. Therefore, the *facts* do not clearly indicate whether these tapers were hired by Mimico as opposed to Melo.

26. Fagerlund worked on the Burloak job until March 25, 2008, when he was laid off, due to a lack of work. He was informed of his lay off by Melo who decided that Fagerlund (and others) were no longer needed because the taping work was almost finished. There was, however, still some taping left to do and Holditch and Tabor who had both worked on March 25th, expected to work on March 26th, and for at least a limited amount of time thereafter. When they reported for work on the 26th, they were met by Melo (even before they actually got onto the jobsite). After a brief conversation, and Melo engaging in a phone call (which I find was with Pereirra), both men were told that they were being laid off effective immediately. Accordingly, and as dealt with in greater detail in the context of the unfair labour practices complaint, I find that the *entity with the power to discharge* factor is also, generally, neutral, given that Fagerlund was laid off by Melo exclusively but Melo and Mimico both played a roll in the termination of Holditch and Tabor.

27. Having found the above dealt with five *York Condominium* factors to be essentially neutral, the identity of the employer in this case turns on the factors relating to *direction and control* of the workers and the *party bearing the burden of remuneration*. In these circumstances it is appropriate to analyze these two factors together. First, to do so is in keeping with the *overall context* approach favoured by the Board, as made clear in such decisions as *Monarch Corporation, supra*. Further, and more importantly, such a combined analysis is particularly appropriate here given the Union's principal argument concerning the overall relationship between Mimico and Melo.

28. The evidence concerning the relationship between Mimico and Melo was given by Pereira and Carlos Melo. From Mimico's perspective the conclusions to be drawn from this evidence are clear and completely straight forward. It asserted that Melo was, and is, one of the subcontractors which it regularly uses to do certain portions of work covered by its general contracts. It agrees that Melo has performed the drywall work on a number of the Tim Horton's/

Harvey's/Swiss Chalet style restaurants that it built in the years immediately prior to the filing of the application for certification. Accordingly, it does not dispute that there is a close working relationship between the two of them but claims that this relationship still remains one which is, as a matter of both form and substance, one of general contractor and subcontractor.

29. Specifically, with respect to the Burloak project, Mimico stressed and relied on the fact that Melo was only working on this site because he had priced the work and that the two of them had thereafter agreed on an overall amount for the performance of the drywall work shown on the drawings which Melo had examined, along with the provision of certain miscellaneous materials. It also noted that, regardless of what the situation may have been for other work, for this project it and Melo had signed a specific purchase order, dated November 5, 2007, which reads in part:

> November 5, 2007
> Carlos Melo
> 262 Cossack Court
> Mississauga, Ontario
> L5B 4C2
>
> P.O. # 1076-5836
> Re: Swiss Chalet/Harvey's
> Burloak Drive
> Oakville, Ontario
>
> Provide all plant, labour, equipment to supply labour only to install all metal studs, insulation, T-bar and drywall including taping, all in accordance with the plans, specifications, and the contract between Mimico Group Inc. and Cara Operations Ltd.
>
> ** A 10% Holdback applies to all supply & install contracts
> ** GST Registration number must appear on all invoices
>
> Total lump sum price..................$ 54,350.00
>
> Provincial Sales Tax included. G.S.T. Extra
>
> Accepted
> "Carlos Melo" "Illegible"
> Carlos Melo Mimico Group Inc.

30. In such circumstances, Mimico argues that clearly Melo, as its subcontractor (and certainly not it as the general contractor), was the party who had *control and direction* of all of the drywall tapers who worked on the Burloak site (including Fagerlund, Holditch and Tabor) as they were performing work covered by his subcontract and he was the person who gave them all of their required instructions and supervision about what to do. Similarly, it argued that Melo, rather than it, bore the burden of remuneration for Fagerlund, Holditch and Tabor given that they were performing, and were therefore being paid for, work covered by Melo's subcontract which involved a fixed price. As such, it had simply agreed to pay Melo a specific amount for the installation of the drywall and what amounts were subsequently paid out, and to which workers, for the performance of that work were decisions which were entirely at the discretion, and were entirely the responsibility, of Melo.

31. The Union's argument concerning the relationship between Mimico and Melo was much more nuanced. It did not deny that Mimico and Melo had a fixed price subcontract covering the drywall work (including the taping) for the Burloak project or that Melo was the person (and was in fact the only person) who instructed, supervised and monitored Fagerlund, Holditch and

Tabor and the work they did on that project. Nevertheless, the Union asserted that, in these circumstances, the general contractor/drywall subcontractor relationship which appears to exist between Mimico and Melo is simply one of form while the actual substance of their relationship is quite different. In reality, the Union claims, Melo is nothing more than a glorified foreman, for Mimico, who is responsible for the drywall work on certain of its projects.

32. Based on its characterization of the *form* of the relationship, the Union's position is that, in instructing, supervising and monitoring the workers doing the drywall taping, Melo was in actuality doing nothing more than carrying out his duties as a *de facto* foreman for Mimico, which represent the practical limits of his organizational competence, in any event. Similarly, the Union's view is that Melo has *no money* besides that which Mimico gives to him (under the guise of the subcontract) and therefore, in reality as opposed to form, Mimico, rather than Melo is the party which bears the burden of remuneration as, without Mimico, Melo would be completely incapable of so doing. According to the Union, Melo is, in these circumstances, simply an empty vessel which Mimico uses to flow through and distribute the money required for its drywall work on certain of its projects, including the Burloak Swiss Chalet. Given this role, the Union's position is that Melo has no real financial responsibilities and certainly no real chance of profit or loss. Its position was that, despite the contract price, he knows his losses will be covered by Mimico if things go wrong and, to the extent that the work on a particular project comes in under budget, Melo has not so much made a profit but has rather received a payment in the nature of a production bonus which foremen often get to reward them for getting work done efficiently.

33. To illustrate and support its positions concerning the true substance of the Mimico/Melo relationship, the Union relied on various aspects of the evidence of both Pereira and Melo. It noted that, in the period surrounding the certification, the vast majority of Melo's work came from Mimico through an ongoing series of sequential subcontracts and, as such, he had become totally integrated within Mimico's operations. The Union further noted that, with respect to these subcontracting arrangements, Melo has no real ability to bid, or negotiate prices, for his work. Essentially, he is called in by Pereira to look at drawings and thereafter, in the Union's eyes at least, is required to accept a *take-it-or leave-it* offer from Mimico, even though he may have first been asked to suggest a price for the work involved. The Union further noted that when an agreement is supposedly reached it is often not reduced to a formal written contract and the only real records which are kept are the regular invoices submitted by Melo, which are essentially identical to the invoices typically submitted by piecework crew leaders who are dependent contractors under the Act.

34. Finally, the Union relied upon his organizational and practical limitations, which were made clear in evidence, to claim that Melo is not, in reality, a legitimate subcontractor. It argues that, essentially, he has no financial ability to perform work independent of Mimico. It noted that, on the Mimico projects, it is Mimico itself which provides all of the materials which Melo uses and that Melo can only pay the workers once he has been paid by Mimico. The Union also relied on the fact that there are no separate structures between Melo's *personal* and *corporate* finances. He only has a personal bank account into which all payments are deposited and from which all cheques are issued. In addition, there seems to be little doubt that Melo's records and record keeping are quite *disorganized* and that some of the practices concerning his work for Mimico were, from a general contractor's/subcontractor's perspective, quite cavalier. For example, prior to this certification being filed he had no WSIB coverage and it appears that this failing never

resulted in a holdback on the part of Mimico and that, on the Burloak project, no set off was ever implemented for that portion of the original subcontract which Mimico ultimately self-performed.

35. There is much to be said for the Union's analysis concerning the extent to which Melo forms part of, as opposed to being separate from, Mimico's overall ongoing operations. However, there are also certain significant problems with it. In the final analysis, these problematic areas are of sufficient importance that the ultimate conclusions which the Union assert simply cannot be upheld.

36. First, it has to be recognized that Melo was not Mimico's *creation*. He has been involved in the construction industry for over twenty years, with a great deal of that time relating to the drywall industry in particular, and has only started working for Mimico in the last few years. He started his own *company*, sometimes using the name Carlos Melo Construction Services, in approximately 2005. Initially, he did exclusively small jobs which did not involve Mimico and at least some of which were residential renovations, which is a type of work which Mimico has no involvement in.

37. It is true that, in the last few years, Melo has developed a close relationship with Mimico. Certainly, in the time period surrounding the filing of the certification, the vast majority of his work came from Mimico and he appears to have got much of this work on the basis of verbal prices and with only the minimal amount of paperwork. However, he also does work for others, most particularly for an entity called WJR Home Services. His work for WJR, while not involving any large jobs, has been steady and he was in fact performing work for it more or less contemporaneously with his work for Mimico on the Burloak site.

38. Melo's records are quite clearly *not the best*. However, the records that he produced were sufficient to establish that prior to this certification being filed he had at least one regular employee and a number of semi-regular employees. These semi-regular employees include drywall tapers who, based on his unchallenged evidence, had worked for him on various projects, including projects other than Mimico projects. Further, there was no basis upon which to disbelieve Melo's evidence that he (and he alone) generally determines which employees he uses, on what projects/work, and at what rates, and that the only reason why Burloak was any different was because his regular tapers were unavailable.

39. It was also clear that Melo does not get all of Mimico's drywall work. In addition to him, it uses its own forces, supervised by one of its own foreman (which is essentially what the taping work in Kitchener devolved into once it was *clear* that Benoit was not acting as a subcontractor), along with using other drywall subcontractors. Further, Melo's uncontradicted evidence was that he doesn't get all of the Mimico jobs he prices. Sometimes such jobs are given to other subcontractors who submitted lower bids.

40. There is no question that on *larger* jobs, which the Burloak Swiss Chalet project obviously was for Melo, he is in many ways *dependent* upon Mimico. For example, having seen his business records, I am quite prepared to believe Melo could not actually perform such work if he had to supply his own materials and did not receive regular payments from Mimico. However, this state of affairs simply indicates that he, like many others in the construction industry, is a small and struggling subcontractor which is heavily reliant upon a principal client, as opposed to establishing that he is not a subcontractor at all.

41. Further, I do not believe that the evidence establishes that the burden of remuneration for Fagerlund, Holditch and Tabor fell upon Mimico rather than Melo. Melo clearly had a fixed price subcontract for the drywall installation and there is no question that it was always expected that any tapers that worked on the Burloak project would be paid by Melo, pursuant to the scope of work set out in that subcontract and the corresponding payments to be made to him by Mimico. It is entirely possible that Melo needed to collect money from Mimico in order to pay the men but that is quite different from finding that Mimico itself actually bore the burden of paying them. Further, it is readily apparent that Mimico provided certain favourable advantages to Melo on this project, such as not subjecting him to a holdback and taking back part of the work without issuing him with an immediate back charge. However, such favourable treatment is as much, if not more, indicative of a general contractor not wanting to bankrupt one of its regular and loyal subcontractors, as it is of a willingness on the part of Mimico to assume Melo's financial obligations, including his obligations to pay Fagerlund, Holditch and Tabor.

42. Accordingly, I find that Melo was, in both form and substance, an independent subcontractor for Mimico when he worked on the Burloak project. Mimico may have played some role in getting Holditch and Tabor, at least, to this project initially. However, once they, and later Fagerlund, arrived on site, all of their work was controlled and directed by Melo, who also clearly bore the burden of remunerating them. Therefore, both of these factors, which are (in view of my earlier findings concerning the neutrality of the other *York Condominium* factors), determinative in this matter, indicate that Melo, and not Mimico, was the true employer of these men.

43. Accordingly, based on the Union's level of membership support, which I find to be less than 40 percent regardless of the outcome of the other employee status issues, this application for certification is hereby dismissed pursuant to section 128.1(7) of the Act.

44. This then leaves the unfair labour practices complaint as it relates to the layoff of Holditch and Tabor on March 26, 2008.

45. The evidence as to what exactly happened on that particular morning was somewhat limited. However, it is clear that, by the morning of March 26th, Pereira was aware that the application for certification had been filed on the previous day and that he and Melo spoke about it, on the phone, early that morning. After this phone call Melo promptly laid off Holditch and Tabor who were, at the time, parked outside of the Burloak site waiting to be let in, in order to start work.

46. Both Pereira and Melo agree that when they spoke that morning, Pereira was *mad* about the certification having been filed and that he told Melo that the Union had used the tapers working at the Burloak site as the basis for its application. However, both men claimed that Pereira gave Melo no advice about what to do and denied absolutely that Pereirra had said anything about having the tapers removed from the project. Melo stated the decision to lay off Holditch and Tabor was his alone and he made it because the work was almost done (and he would be able to finish what was left himself) and because his most important client was clearly very upset about what these tapers had done.

47. In their evidence concerning what happened that morning, Holditch and Tabor both stated that they were sitting in their vehicle, which was parked outside of the site, while they

waited for it to be opened up at approximately 7:00 a.m., when Melo approached them and began questioning them about the signing of union cards. They claim that this conversation was interrupted when Melo got a phone call which he said was from Jorge (Pereira). Then, after a number of minutes, Melo returned to tell them that they were not allowed on the site anymore. After some negotiations, they were eventually allowed into the building, but only under escort, in order to collect their tools, following which they left.

48. Having carefully considered the evidence, I conclude that it is more likely than not that Holditch and Tabor were in fact terminated that morning because Pereira had made it clear to Melo that he wanted them off the site because he believed they had supported the Union's application for certification. First, although this project was winding down, it is clear that on March 26th there was still some taping work left to do and I believe that Holditch and Tabor went to the site that morning fully expecting to work. There is no other logical reason as to why they would be at the project on the morning of the 26th and why they would have left their tools on site at the end of the previous day. Further, having carefully considered his evidence there is no clear and logical reason why Melo would have acted the way he did if Pereira had not, at the very least, strongly suggested to him that Mimico wanted Holditch and Tabor off this project right away. Why else would Melo tell them they were not allowed to set foot on the site any more, and why else would permission have been needed, and an escort provided, in order to allow them back on to the site to collect their tools?

49. In making the above findings, I am not also finding that Pereira had the ultimate power to actually lay off Holditch and Tabor (such that it might indicate that Mimico was their employer). Rather, I believe that Pereira, because of how angry he was about the certification application, in all likelihood gave Melo somewhat of an ultimatum along the lines of – *either they go or you all go*. The decision to terminate Holditch and Tabor was then Melo's but I also have no doubt that he made his decision in order to appease the wishes of his most important client who wanted action taken against them because of their suspected support for the Union and its certification application. Therefore, I find that, in addition to any violations of the Act by Melo, Mimico also violated section 76 of the Act in these circumstances,

50. The evidence concerning exactly how much work remained for Holditch and Tabor at the time of their termination was equally limited. However, having considered the evidence which was led concerning this particular issue, and in view of the fact that March 26th was a Wednesday, I believe that it is more likely than not that they would have finished the week, and been laid off at the end of the work day on Friday, March 28th, but for the violations of the Act. Accordingly, each man is entitled three (3) days' pay, along with the appropriate interest, which I hereby direct Mimico to pay to the Union, on behalf of its members Holditch and Tabor, forthwith. In addition, I hereby direct the Union to advise the Board within twenty (20) days of the date of this decision if it wishes this matter re-listed for hearing to deal with any remaining remedial issues.

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**0593-09-JD** Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 493 and Universal Workers' Union, Labourers' International Union of North America, Local 183, Applicants v. **PCL Constructors Canada Inc.**, The Downsview Group, Greater Ontario Regional

Council of Carpenters, Drywall and Allied Workers, Local 2486, and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786, Responding Parties

**Construction Industry – Jurisdictional Dispute – Work in this dispute consisted of carpentry portions of concrete forming work for footings, retaining walls and planter boxes located outside of the building structure at the North Bay Regional Health Centre Project – The general contractor on the project, PCL was bound to both the Carpenters' and the Labourers' ICI agreements – PCL subcontracted certain concrete forming work to Downsview, which was not bound to the Carpenters' ICI agreement – Downsview assigned the concrete forming work to the Labourers – The Carpenters filed a grievance against PCL for violating the subcontracting clause of the ICI agreement – In response, the Labourers filed a jurisdictional dispute – A primary issue was whether the work in dispute fell within the ICI sector or in the roads sector of the construction industry – Considering the usual factors in sector disputes, the Board found that the work in dispute was work that fell within the ICI sector – The Board then proceeded to determine the merits of the jurisdictional dispute and found that the work in dispute ought to have been assigned to the Carpenters rather than to the Labourers – It was ICI work and the Carpenters had a collective agreement covering the work in dispute while the Labourers did not – The area practice evidence favoured the assignment of the work to the Carpenters – The employer practice evidence filed by the Labourers, PCL and Downsview was not persuasive and the economic and efficiency evidence favouring the Labourers was not sufficient enough to dislodge the significance of the collective agreement obligations owed to the Carpenters – Application allowed**

**BEFORE:** *Lee Shouldice*, Vice-Chair.

**APPEARANCES:** *S.B.D. Wahl, M. Ryan* and *G. Strazzanti* appearing for Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 493 and Universal Workers' Union, Labourers' International Union of North America, Local 183; *Walter Thornton, Paul Richer* and *David Ogryzlo* appearing for PCL Constructors Canada Inc.; *Walter Thornton* and *Travis Marren* appearing for The Downsview Group; *D. Wray, Tom Cardinal* and *Gabe Parent* appearing for Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2486.

**DECISION OF THE BOARD:** December 30, 2010

**Introduction**

1. This application is a work jurisdiction dispute in the construction industry filed with the Board pursuant to section 99 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act").

2. The work in dispute is described as follows:

> all work associated with the installation of reinforcing steel and the carpentry portions of concrete forming work for the footings/retaining walls/planter

> boxes constructed by The Downsview Group at the North Bay Regional Health Centre Project, North Bay, Ontario.

The concrete formwork in connection with the retaining wall for the steps leading up to the hospital is included within this description.

3. Prior to the commencement of the consultation held in this proceeding, the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 resolved its dispute with the remaining parties and withdrew consideration of the reinforcing steel portion of the work in dispute from this proceeding. Accordingly, the work in dispute as argued at the consultation consisted solely of the carpentry portions of concrete forming work for the footings/retaining walls/planter boxes in question.

4. The general contractor on the project is PCL Constructors Inc. ("PCL"). PCL is bound by both the Carpenters' Provincial ICI Collective Agreement and the Labourers' Provincial ICI Collective Agreement. PCL subcontracted certain concrete forming work to The Downsview Group ("Downsview"). Downsview is not bound by the Carpenters' Provincial Collective Agreement, but is bound to a number of collective agreements with the three Labourers' unions identified as applicants to this proceeding (hereinafter referred to collectively as "the Labourers"). Downsview assigned all of the concrete formwork to members of the Labourers. The Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2486 (the "Carpenters") filed a grievance against PCL claiming a violation of the subcontracting clause of its Provincial Collective Agreement. In response the Labourers filed this jurisdictional dispute.

## The Sector Question

5. A primary issue raised in this proceeding is whether the work in dispute falls within the ICI sector or the roads sector of the construction industry. The panel of the Board assigned to the pre-consultation conference determined that this question would be one of the issues dealt with by the Board on the merits. Accordingly, the parties addressed this issue in their written briefs and counsel made submissions regarding this issue at the consultation.

6. The Carpenters assert that the work in dispute is properly characterized as work in the ICI sector of the construction industry. If the Board were to characterize the work in dispute as work falling within that sector, the Carpenters assert that its members clearly ought to have been assigned the work. On the other hand, the Carpenters acknowledge that if it were to be determined that the work in dispute is work within the roads sector of the construction industry, it would be extremely difficult for it to succeed in this proceeding given that it lacks a collective agreement with PCL or Downsview covering the roads sector. The Labourers assert that its members were properly assigned the work no matter which of the two sectors the work in dispute is found to fall within. PCL and Downsview also assert that it is not necessary to make a sector determination in this proceeding.

7. It is appropriate to consider the sector issue at the outset of this proceeding. I set out below a condensed version of the written and oral submissions made by the parties on this issue. I only intend to deal with the submissions raised by the parties that have meaningful relevance to this issue.

8. Section 126(1) of the Act defines the term "sector" as follows:

> "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector

9. All parties agree that the approach taken by the Board to the determination of sector disputes is reflected by its decision in *City of Sault Ste. Marie*, [2002] OLRB Rep. September/October 870. The critical passage of that decision reads as follows:

> 39. In the end, what this means is that there is no single test which can be applied to determine sector, nor is there a descending order of factors which directs the Board to look at the "end-use" first and only later at work characteristics or bargaining patterns as a means of resolving doubtful cases. It is necessary to examine all the relevant factors. In most cases all of them will be present to some extent (or one will and the others will be neutral). It is where they do not point in the same direction that the Board must determine which sector the work falls in, having regard to both of the statutory definition of sector and the statutory purpose of sectoral divisions.

The parties addressed the factors of end use, work characteristics and bargaining patterns in their written submissions and at the consultation.

10. The Carpenters state that the construction of a hospital and mental health centre clearly falls within the ICI sector of the construction industry. It notes that the concrete forming work performed for the purpose of creating the structure of the hospital was performed pursuant to ICI sector collective agreements, and that when performing that work Carpenters and Labourers were both assigned work in accordance with traditional concrete formwork practice.

11. With respect to the question of work characteristics, the Carpenters state that a proper assessment of that factor ought to include consideration of all types of work performed on a particular project, and not just the work characteristics of the specific work in dispute. In this case, the Carpenters state that the work characteristics reflected by the construction of the project are those of ICI sector work, as are the work characteristics reflected by the concrete formwork performed outside the shell of the building. The Carpenters primarily rely upon the Board's decision in *Ellis-Don Limited*, [1993] OLRB Rep. November 1130. It is asserted that that decision is directly on point. The decisions of the Board in *H. Kerr Construction Ltd.*, [1999] OLRB Rep. July/August 609, and *Interpaving Limited*, [2001] OLRB Rep. September/October 1191, are also relied upon.

12. The Carpenters rely upon two further factual assertions. First, that in a previous grievance referral to the Board by the Carpenters against PCL relating to certain work performed at the Baycrest Hospital, PCL agreed that the Board issue a decision declaring that it had violated the Carpenters Provincial ICI agreement by improperly subcontracting work covered by that collective agreement. The work was described in the settlement as "the carpentry portion of concrete formwork including the forming of concrete planter boxes, stairs and other carpenters' work". Second, the Carpenters assert that Labourers' Local 493 acknowledged in May, 2007 that

the curbs and sidewalks on a Shoppers Drug Mart project in Hanmer, Ontario fell within the ICI sector of the construction industry.

13. In its initial brief, the Carpenters made no submissions regarding bargaining patterns. It asserts that the end use of the project is clearly institutional.

14. The Labourers assert that the work in dispute is properly characterized as being in the roads sector. It states that the work characteristics reflected by the concrete formwork in dispute are identical to those reflected by concrete formwork performed in the roads sector of the construction industry. According to the declarations filed with the Board by the Labourers, the types of materials used, the skills required, the problems to be dealt with, and the resulting solutions, are equivalent.

15. The Labourers further assert that the subcontract by PCL to Downsview contains the hallmarks of a roads sector subcontract, in that certain sections of the contract make reference to plans and specifications issued by the architects relating to "concrete walks, curbs and gutters" and "driveways, sidewalks, curbs and gutters, parking slabs" – work typically treated as roads sector work. In addition, the Labourers state that the subcontract between PCL and Downsview requires Downsview to comply with concrete formwork specifications that are exclusive to the roads sector. In that regard, the Labourers note that the subcontract requires the work to meet Ontario Provincial Standard Specifications ("the OPS Standards"). The Labourers assert that the OPS Standards are a comprehensive set of standards specifications that have been used and relied upon in roads sector construction since 1984, and that concrete formwork in the ICI sector does not have to meet these standards.

16. With respect to bargaining patterns, the Labourers assert that the bargaining patterns associated with the work in dispute are not typical of those found in the ICI sector, both commercially and with respect to labour relations. The work in dispute does not appear on any of the project's structural drawings and was not included in the structural concrete ICI package within the building established by PCL. Instead, PCL subcontracted the hard landscape work outside the building perimeter at the hospital, including the work in dispute, under a separate bidding package. The Labourers state that in the ICI sector structural formwork is typically subcontracted in a package that does not include any hard landscape concrete formwork outside the ICI building perimeter. Instead, hard landscape concrete formwork is tendered and bid as part of a stand alone package along with all of the concrete formwork required for parking lot, curb and sidewalk construction. According to the Labourers, the industry practice and commercial bargaining reality is that all concrete formwork outside the building perimeter on an ICI sector project has been and is consistently treated as roads sector work. The tendering and bidding process of the work in dispute reflects this reality.

17. The Labourers also assert that the work in dispute (along with other work, such as the construction of sidewalks, curbs, gutters and parking slabs) is work covered by any one of a number of collective agreements, such as the Ontario Form Work Association collective agreement, the Labourers' Provincial Civil Engineering Agreement, and various local area agreements such as the Labourers' Local 183 Landscape Collective Agreement and the Sudbury Heavy Civil Construction Collective Agreement. The Labourers assert that these agreements are all clear examples of the industry bargaining patterns with respect to the work in dispute, and confirm the industry's recognition that the work in dispute falls outside of the ICI sector.

18. Finally, with respect to the factor of end use, the Labourers state that the end use of the footings, planter boxes and retaining walls is no different than those same concrete formations in the roads sector, in that they are designed to facilitate both the access and egress of human and vehicular traffic at the hospital, and to ensure proper drainage. Counsel characterized the retaining walls as curbs for the "road into the building", namely the ramp and walkway into the hospital.

19. Consistent with their position that the question of sector need not be addressed by the Board, PCL and Downsview made no submissions of any significance on the sector question.

20. In response to the Labourers submissions, the Carpenters note that the Labourers do not accurately describe the work in dispute throughout its brief, describing the work as "footings, sidewalks, curbs, gutters, parking slabs, planter boxes and retaining walls", rather than as described above in paragraph 2. Furthermore, it disputes the relevance of the particular OPS Standards referred to by the Labourers in its submissions, and asserts that the Labourers did not provide any evidence or explanation as to how the OPS Standards differ by sector so as to be relevant to work characteristics. The Carpenters assert that the OPS Standards have no relevance at all to the question of sector determination.

21. With respect to the submissions made by the Labourers respecting bargaining patterns, the Carpenters state that Board jurisprudence has made it clear that local bargaining patterns are irrelevant in sector determinations, particularly if the ICI sector is in play. The Carpenters state that the Labourers have not relied upon any provincial bargaining patterns to support their claim, that the concept of "commercial bargaining reality" has no meaning, and that how a general contractor such as PCL divides up its subcontracting packages is irrelevant to the question of sector. The Carpenters note that the fact that the Labourers refer to several of its collective agreements as arguably covering the work in dispute illustrates that the Labourers do not agree amongst themselves as to which sector the work actually falls. The Carpenters argue that the Labourers appear to maintain that the work in dispute fell within a "landscaping" sector of the construction industry, a sector that the Board has never recognized and in fact rejected in *Ellis-Don Limited*, cited above. It is also noted that none of the materials filed by the Labourers, Downsview or PCL actually identify under which collective agreement the work in dispute was actually performed.

22. The Carpenters note that the 16 declarations relied upon by the Labourers in support of their position actually state on their face that the work in dispute on various similar jobs listed in the North Bay area was performed under the Labourers Provincial ICI Agreement – and thus actually support the position taken by the Carpenters.

23. Finally, the Carpenters assert that the position taken by the Labourers with respect to end use is "self-serving [and] unsupported by evidence or analysis", and reject it.

## Decision on Sector Issue

24. For the reasons that follow, I am of the view that the work in dispute is work that falls within the ICI sector of the construction industry.

25. I agree with the observation made by the Carpenters that throughout the Labourers brief the work in dispute is almost invariably described differently than it was determined to be by

the Board in its decision dated June 12, 2009. The work in dispute was further clarified by way of Carpenters' counsel's correspondence dated September 4, 2009, with which no other party took issue. It is not a successful strategy for a party to unilaterally re-define the work in dispute in order to rely upon evidence that would support the assignment of the work in dispute to that party's members if that work were something different than it actually is. If the evidence offered does not relate to the actual work in dispute it will be given no weight. The discrepancy between the definition of the work in dispute and its characterization by the Labourers became evident when the parties' briefs were initially reviewed prior to the consultation. I have kept that discrepancy in mind when I have assessed the quality of the written declarations and other materials filed by the Labourers.

26. As noted above, the Carpenters rely upon the Board's decision in *Ellis-Don Limited*, [1993] OLRB Rep. November 1130 in support of its assertion that the work in dispute is construction work in the ICI sector. It asserts that that decision is directly on point, and ought to be followed. In *Ellis-Don Limited*, the question before the Board was whether the carpentry portion of concrete forming work in relation to various outdoor concrete structures (including retaining walls, seating walls and planters) was work that fell within the ICI sector of the construction industry, or whether that work fell within a previously unrecognized "landscaping" sector of the construction industry.

27. The critical passages of the Board's decision for the purposes of the sector issue are set out immediately below:

> 33. Turning to the merits of the sector issue, we are satisfied, having regard to all the material before us and the representations of the parties, that the work in dispute is work in the ICI sector of the construction industry. Even assuming for the present purposes there is a distinct sector known as the "landscaping sector", we are not satisfied that it extends to include the work in dispute. It does not appear to us that the concrete forming work in relation to the outdoor structures is materially different from the concrete forming work in relation to the building to which it is related. The types of materials used, skills required and problems and solutions to be dealt with are also similar. It may be, as the Labourers assert, that there are unique problems for concrete forming where its purpose is to sustain plant life. Yet it is also true that any concrete forming on an ICI project must take into account the particular needs of the structure being formed. Further, concrete planters are only one element of the work in dispute, much of which does not relate to plantings.
>
> 34. Further, part of the work is physically situated on or connected to the ICI structure. For instance, on both the Ellis-Don project and the Jackson-Lewis projects, many of the structures are located on an underground garage serving the building. Other aspects of the work are directly connected to the building. It is all work which was done in conjunction with the erection of an ICI building and which came under the overall responsibility of the general contractor responsible for the erection of the building. To the extent that it is relevant to look to "characteristic relations with employees" in deciding sector issues, the materials indicate that on many other similar projects, the work has been done by ICI formwork contractors. Sometimes the analogous work forms part of the overall formwork package for the project, and on occasion it has been done under a separate contract for formwork in relation to outdoor structures. As well, on some ICI projects, fewer in number than the above, the formwork has been part

> of a contract which also included general landscaping work. We are satisfied that, overall, concrete forming work on outdoor structures on ICI projects has tended to be organized in the same or similar way as work on the ICI structure itself.

The Carpenters also relied upon the Board's observation at paragraph 42 in *Ellis-Don Limited* that it would be unwise to fragment construction projects by carving out the "outside construction" from the project as a whole.

28. The Labourers distinguish *Ellis-Don Limited* on two separate grounds. First, it is noted that a key feature of the concrete formwork at issue in that proceeding was that the formwork was located on top of an underground garage servicing the building – an ICI structure. It is asserted that the physical connection between that structure and the concrete formwork in dispute was viewed by the Board as being virtually determinative of the sector dispute. In the instant proceeding, the work in dispute is outside of the building perimeter and is not tied to the structure of the hospital itself.

29. In addition, the Labourers note that in *Ellis-Don Limited* the Board determined that the industry practice in 1993 was for the work in dispute to be performed by ICI structural formwork contractors and was organized as part of the ICI building erection package. It is asserted that this is no longer the case. The Labourers state that current industry practice reflects that the work in dispute is no longer tendered or bid as part of an ICI structural building erection package. The Labourers assert that there is now a clear divide between the structural concrete formwork and the landscape concrete formwork components of construction projects, and that those two components are tendered and bid separately. According to the Labourers, the industry practice that existed in 1993 when the Board decided *Ellis-Don Limited* no longer exists. Today, it is asserted that industry practice is to treat the work in dispute as roads sector work.

30. In that regard, the Labourers rely upon declarations filed by Travis Marren, the Concrete Manager of Downsview, by Patrick Little, the Business Manager of Labourers International Union of North America, Ontario Provincial District Council, and by Mike Ryan, the Business Manager of Local 493. Mr. Marren, Mr. Little and Mr. Ryan state in their declarations that structural formwork relating to an ICI building structure is typically subcontracted in a package that does not include any hard landscape concrete formwork outside the ICI building perimeter. They state that hard landscape concrete formwork is usually tendered and bid as part of a stand alone package along with all of the concrete formwork required for parking lot, curb and sidewalk construction. As a result, Mr. Marren, Mr. Little and Mr. Ryan assert that the industry practice and commercial bargaining reality has been to consistently treat all concrete formwork outside the perimeter of an ICI building to be roads sector work. They state that the tendering and bidding processes for the work in dispute reflect this reality.

31. In my view, the underlying facts of *Ellis-Don Limited* are sufficiently different than those disclosed by the instant proceeding so as to allow for the conclusion that that decision does not have direct application to this work assignment dispute. The work in dispute in this proceeding is not as integrated with the construction of the main hospital building as were the structures in *Ellis-Don Limited.* Here there is no meaningful physical connection between the work in dispute and the hospital. The retaining wall (which was built up to 12 feet in height and subsequently backfilled so as to form walls above grade ranging from .2 metres to 1.64 metres in

height) does touch the hospital building, but only in the sense that it abuts the outside wall of the hospital, a connection that serves no structural purpose. In addition, in *Ellis-Don Limited* the Board concluded that the types of materials used, the skills required, and the problems and solutions to be dealt with and found, respectively, relating to the work in dispute were similar to those incurred with respect to ICI sector forming. They are here as well. However, according to the materials filed by the Labourers, they are also similar to those incurred with respect to forming in the roads sector of the construction industry. The Carpenters did not file any materials that assert otherwise.

32. Another factor considered by the Board in *Ellis-Don Limited* decision does support the position taken by the Carpenters. The work was completed in conjunction with the erection of an ICI building, under the overall responsibility of the general contractor responsible for the erection of the building. That is also the case in the instant proceeding.

33. Also of significance in *Ellis-Don Limited* was the fact that on many similar projects the work in dispute was performed by ICI formwork contractors, sometimes as part of the overall formwork package, and occasionally by way of separate contract. The conclusion reached by the Board was that concrete forming work on outdoor structures on ICI projects tended to be organized in the same or a similar way as the work on the ICI structure itself, and therefore that the work in dispute was work in the ICI sector of the construction industry. In the instant case, the work was packaged separately by PCL and was not performed by an ICI formwork contractor. In fact, the evidence established that no ICI formwork contractor bid to perform the work.

34. In light of the factual distinctions between the instant case and *Ellis-Don Limited*, one cannot conclude that the same result as in *Ellis-Don Limited* must necessarily be reached in this proceeding. I turn to the different factors that the Board considers when it is faced with a sector dispute.

## Factors to be Considered

### *(a) Work Characteristics*

35. A close review of the declaration materials filed by the Labourers raises significant questions regarding their relevance to the work in dispute.

36. The declaration material filed by the Labourers states the following with respect to work characteristics:

> The work characteristics required to construct the landscape concrete form work at issue in this dispute: footings, sidewalks, curbs, gutters, parking slabs, planter boxes and retaining walls are identical to those required to construct footings, sidewalks, curbs, gutters, parking slabs, planter boxes and retaining walls in the Roads sector. The types of materials used, skills required and the problems and solutions to be dealt with are equivalent.

The work in dispute in this proceeding is all work associated with the carpentry portions of concrete forming for the footings, retaining walls and planter boxes at the hospital. Work characteristics relating to the construction of sidewalks, curbs, gutters and parking slabs have no relevance to the determination of this proceeding. Furthermore, the description of the work in dispute as contained in the declarations filed by the Labourers is not limited to the carpentry portion of concrete forming, but to all of the forming, including the construction labourer portion of that forming. As a result of these ambiguities it is difficult to put much if any weight on the declaration evidence offered by the Labourers. It just does not reflect evidence relating only to the work in dispute.

37. The materials filed by the Carpenters do speak to the question of work characteristics. The Carpenters assert that on unionized projects in North Bay the carpentry portion of concrete forming work on ICI sector projects has always been performed by its members, and that many of these projects involved concrete formwork built in connection with the project but outside of the walls of the building itself, including retaining walls. The declaration filed by Tom Cardinal, a Senior Representative of the Carpenters, states that this is the first time, to his knowledge, that concrete formwork such as the work in dispute has been subcontracted to a company not bound to the Carpenters Provincial ICI Agreement.

38. By reference to photographs of the work in dispute contained in the Carpenters brief, Mr. Cardinal states that the work in dispute is the same type of work previously performed by members of the Carpenters under its Provincial ICI Agreement, including work at the hospital itself. In addition, the Carpenters filed with the Board declarations filed by 25 of its members who state that they have performed the carpentry portion of formwork for footings, retaining walls and other concrete structures outside buildings on ICI sector projects, and that they did so pursuant to the terms of the Provincial ICI Agreement. According to those declarations, the projects in question spanned the time period commencing in approximately 1985 and ending in 2009. Accordingly, the Carpenters state that the performance of the work in dispute outside the building is, from the perspective of work characteristics, identical to the performance of the work within the building.

39. The Labourers rely upon the fact that the subcontract between PCL and Downsview requires Downsview to comply with certain construction standards that are applicable to roads sector work. That observation is accurate. However, the actual obligation imposed upon Downsview by the Schedule "A" to its subcontract with PCL is worded more broadly. "Without limiting the scope of the subcontract", Downsview is to comply with "all related specification sections and general requirements" issued by the architects and their sub-consultants. Accordingly, the position taken by the Carpenters, namely that other sections of the plans and specifications have as much relevance to the work in dispute as those relied upon by the Labourers, is accurate.

40. The above-referenced plans and specifications do make reference to certain OPS Standards, as submitted by the Labourers. However, that reference creates its own ambiguity. The Labourers submit that the OPS Standards are exclusively applied in roads sector construction, and state that concrete formwork performed in the ICI sector does not have to meet the OPS Standards. Undoubtedly the OPS Standards do have application to road building contracts. However, the use of those standards is not exclusive to the roads sector. Correspondence from a Professional Engineer employed by R.M Belanger Limited filed by the Carpenters in its reply brief states that the OPS Standards "are commonly used as a reference in all aspects of the construction industry" and that they are "simply referred to by design engineers and owners in order to set and keep a standard level of quality of workmanship and material incorporated into the

work". Those assertions are consistent with the materials filed by the Labourers. Furthermore, as noted by the Carpenters, the Labourers do not provide any explanation in their materials as to how the OPS Standards differ by sector so as to be relevant to the question of work characteristics. The reference in the contract materials to the OPS Standards does not support the conclusion that the Labourers ask the Board to draw.

41. As noted above, the Carpenters rely upon an admission by PCL to the effect that the forming of concrete planter boxes and stairs on a project at the Baycrest Hospital fell within the ICI sector of the construction industry. I put very little weight on this admission by PCL. As noted by counsel for the Labourers during argument, there is no assertion that the Labourers were made aware of this claim by the Carpenters at the time it was made, and therefore had any opportunity to challenge the work assignment. In that context, the admission made by PCL is of little assistance.

42. I reach the same conclusion with respect to the assertion by the Carpenters that Labourers' Local 493 acknowledged during May, 2007 that the construction of curbs and sidewalks on a Shoppers Drug Mart project in Hanmer, Ontario fell within the ICI sector of the construction industry. It is clear from the materials filed with the Board that in May, 2007 Local 493 of the Labourers' did claim that curb and sidewalk work performed by R.M. Belanger Limited at a Shoppers Drug Mart project in Hanmer, Ontario was work in the ICI sector. However, the work in dispute is not the construction of curbs or sidewalks. Furthermore, it is not clear from the materials filed with the Board whether that assertion was ever pursued beyond the filing of a grievance letter by Local 493. Unions make claims for work every day. A claim for work standing on its own is not a meaningful admission of anything. In these circumstances, no weight can be attributed to the assertion made by Local 493.

43. Having regard to all of the evidence before the Board, the performance of the work in dispute primarily reflects the use of work characteristics found in the ICI sector of the construction industry. The declarations filed by the Carpenters establish that assertion. The photographs of the work in dispute reinforce the assertion made by the Carpenters. The declaration material filed by the Labourers is considerably weakened by its failure to properly describe the work in dispute. The requirement that Downsview comply with the OPS Standards is a factor in favour of the position adopted by the Labourers, but for the reasons identified above compliance with those standards is not limited only to work performed in the roads sector of the construction industry. When all of the evidence is considered and weighed, the conclusion I reach is that the performance of the work in dispute reflects the use of work characteristics found in the ICI sector forming.

### *(b) Bargaining Patterns*

44. Turning to the question of bargaining patterns, the assertion made by the Carpenters that Board jurisprudence puts no weight on local bargaining patterns in sector determinations, particularly where the ICI sector is in play, is supported by the Board's decision in *City of Sault Ste. Marie*, cited above. In that case, the Board made the following observations at paragraph 36 of its decision:

> … While the use of local bargaining patterns is of no assistance in determining sector, particularly if one party alleges in the ICI sector, provincial bargaining

> patterns are relevant and may be (whether the decision articulates it or not) determinative.

and again at paragraph 75 of its decision:

> The Board must inevitably give very little, if any, weight to local bargaining patterns. No doubt the shortness of time between the filing of the application and the consultation held in this matter explains the lack of province-wide evidence. However if the Board is to deal meaningfully with bargaining patterns in defining the boundaries of the ICI sector (if not all sectors) it is necessary to have evidence of bargaining patterns across the province.

Here, the Carpenters assert that the Labourers have not relied upon any provincial bargaining patterns to support the claim that the work in dispute is in the roads sector.

45. The Carpenters also assert that how PCL decided to put together the work packages for the purposes of the hospital project is not determinative of the question of sector. In this regard, the Carpenters rely upon *Dufferin Construction Co.*, [2001] OLRB Rep. March/April 323, at paragraph 30. I agree with this assertion. To the extent that the briefs filed by the Labourers make reference to bargaining patterns "in a commercial bargaining pattern sense", I put little weight on that evidence. As noted by the Board in *City of Sault Ste. Marie*, cited above (relying upon *Matthews Contracting Inc*., [1993] OLRB Rep. December 1332), to do otherwise would put undue weight upon the manner in which PCL viewed the project.

46. The evidence relied upon by the Labourers to support its position on bargaining patterns is curious. As noted above, the Carpenters assert that there is no evidence before the Board to suggest that on a province-wide basis the construction industry treats concrete formwork outside an ICI building perimeter as work in the roads sector. The declarations filed by Messrs. Marren, Little and Ryan, though they do not expressly make reference to a "province-wide" industry practice, do state that "industry practice" is to treat the work in dispute as roads sector work. I read those declarations as asserting the existence of such a practice throughout the province.

47. What is curious about the brief filed by the Labourers is that nowhere in that brief is it identified under which collective agreement the work in dispute was actually performed. The brief filed by Downsview shares that same characteristic. I agree with the observation made by counsel for the Carpenters to the effect that there is ambiguity reflected in the documents filed with the Board regarding the collective agreement under which the Labourers assert that the work in dispute was performed. This is particularly important because the Labourers and Downsview assert the existence of a province-wide practice. Counsel for the Labourers stated during argument that the practice his client asserted was province-wide, but established on a "local area basis" through the auspices of the Labourers' Provincial Civil Agreement and the Sudbury Heavy Civil Construction collective agreement.

48. In fact, the Labourers identify in their brief (and Mr. Little and Mr. Ryan identify in their declarations) four separate collective agreements under which the work in dispute could have been performed – the Ontario Form Work Association collective agreement, the Labourers' Provincial Civil Agreement, the Labourers' Local 183 Landscape collective agreement and the Sudbury Heavy Civil Construction collective agreement. At no time is it identified which

collective agreement was actually applied to the work in dispute. Mr. Marren in his declaration identifies that Downsview is bound by a number of specialty agreements with the Labourers, including the same four collective agreements identified above. Downsview and PCL state in their combined brief that the work in dispute was assigned to members of the Labourers "who are employed in accordance with a collective agreement with the [Labourers] and in accordance with Downsview's consistent and established employer practice". Downsview and PCL state in another portion of their brief that Downsview performed the work in dispute "under the terms and conditions of the [Labourers] collective agreements". That statement suggests that the terms and conditions of at least two collective agreements were applied to the performance of the work in dispute. If the practice asserted by the Labourers is established and consistent, presumably the actual collective agreement applicable to the work in dispute could have been identified. It was not.

49. There were short declarations filed by the Labourers to establish their asserted practice with respect to the work in dispute in Board Areas No. 8 and 15. Neither declarant identified the collective agreement pursuant to which the work in dispute has been performed in those Board Areas. There were no declarations from contractors or road builder associations stating that they applied a particular Labourers roads sector collective agreement to the work in dispute, anywhere in the province.

50. As noted earlier, many of the declarations filed by the Labourers specifically state that work similar to the work in dispute (and, in the case of some declarants, the actual work in dispute), was performed pursuant to the Labourers Provincial ICI collective agreement. It is difficult to assess how much weight should be placed on these documents. The declarations in question appear to be "pro forma" declarations prepared by counsel that may or may not have actually been read by the persons completing and signing them. However, the declarations were put forward by the Labourers in their brief filed with the Board and I have to assume that both the Labourers and those signing the declarations understood the contents of the declarations before they were signed, added to the consultation brief and filed with the Board. At the very least the declarations raise a real ambiguity regarding which collective agreement has been applied to work similar to the work in dispute previously, an ambiguity that ought to have been clarified by the Labourers.

51. In that regard, counsel for the Labourers asserted during argument that the work in dispute was in fact performed pursuant to the Sudbury Heavy Civil Construction Agreement. It is not entirely clear that he was correct. An Employer Contribution Report was filed with the Board by Downsview for the month of May, 2009 that states on its face that the Sudbury Heavy Civil Construction Agreement was the relevant collective agreement. However, the corresponding document from Benefit Plan Administrators Limited also filed by Downsview reflects certain deductions and remittances made by Downsview that are not required by the Sudbury Heavy Civil Construction Agreement, but are required by one or more of the other collective agreements identified by the Labourers.

52. In light of all of the above, I am not satisfied that the evidence filed by the Labourers and Downsview establishes that the work in dispute has been performed under any particular collective agreement or that the work in dispute has been performed pursuant to one or more roads sector collective agreements throughout the province. The quality of the evidence offered is suspect. On balance, the assertion made by the Labourers and Downsview regarding bargaining

patterns has not been established. The evidence establishes, instead, that this work has typically been performed by members of the Carpenters pursuant to its Provincial ICI Agreement.

### *(c) End Use*

53. The materials filed by the Labourers with respect to the question of end use have the same underlying weakness as the materials they filed with respect to the factor of work characteristics. According to the brief filed by the Labourers:

> The Labourers submit that the end use of the footings, sidewalks, curbs, gutters, parking slabs, planter boxes and retaining walls is not different than the end use of these very same concrete formations in the Roads sector. The footings, sidewalks, curbs, gutters, parking slabs, planter boxes and retaining walls constructed at the NBRHC are designed to facilitate the access and egress of human and vehicular traffic at the NBHRC and to facilitate proper drainage – the exact same end use when footings, sidewalks, curbs, gutters, parking slabs, planter boxes and retaining walls are constructed in the Roads sector.

As noted earlier, the work in dispute in this proceeding is all work associated with the carpentry portions of concrete forming for the footings, retaining walls and planter boxes at the hospital. The end use of sidewalks, curbs, gutters and parking slabs has no relevance in this proceeding. The Carpenters assert that the end use of the project is a hospital, and therefore that the end use is institutional in nature.

54. The position taken by the Labourers with respect to end use of the footings, planter boxes and retaining walls – that it is identical to the end use of those same concrete formations in the roads sector of the construction industry - has some merit. The actual walkway, of course, is the structure that facilitates the access and egress of persons at the hospital, and that facilitates proper drainage. However, the retaining walls (and their related footings) and some of the planter boxes do assist in achieving that purpose. Many of the planter boxes at the hospital are constructed sufficiently distant from the retaining walls and walkway that they serve little purpose in this regard.

55. In *C.S.B.I. Contracting Ltd.*, [2003] OLRB Rep. September/October 737, the Board made the following observations that are pertinent to the determination of "end use":

> 15. In any event, while the Board will generally treat a construction project as a whole for purposes of a sector determination (see *City of Sault Ste. Marie, supra* at page 879; *West York Construction Ltd.*, [1983] OLRB Rep. Dec. 2132 at 2141), a large scale construction project with many different components, depending on the nature of the work and how it is carried out, might well fall into different sectors. The Board in *Steen Contractors Limited,* [1989] OLRB Rep. Nov. 1173 made the following observation at page 1178:
>
>> Where the construction work for a particular project is closely integrated, as would be the case in the construction of a building, then all of the work of that project would fall within the same sector. Where however the work to be done is distinct, the responsibility for it is clearly severable and where such work appears to patently fall within one of the

> enumerated sectors of the construction industry, there is not any compelling reason to distort the concept of sector in order to find that all of the work on a project falls within the same sector.
>
> ...
>
> 17. ... A sector determination must involve an assessment of the work characteristics of a construction "project". The construction project in this case is the repair of the ceiling surface of a tunnel, not the excavation and creation of the tunnel.

56. In my view, similar considerations apply to the determination of the question of end use in this proceeding. There is no dispute that the construction of the hospital building itself was work in the ICI sector. The end use of the project as a whole is institutional in nature. Although the work in dispute is part of a separate package of work established by PCL, and arguably could be characterized as a "project" in and of itself, on a practical level the work in dispute is integrated with the construction of the building as a whole. As noted above, a sector determination involves an assessment of the work characteristics of a construction "project". The construction "project" in the instant case is the hospital, and therefore is institutional in nature. That is the "end use" upon which the Board should be focused.

57. Having regard to all of the factors identified above, I am of the view that the work in dispute is properly characterized as work in the ICI sector of the construction industry. A consideration of the end use of the work in dispute supports the position taken by the Carpenters. Consideration of other factors also suggests that the work in dispute is ICI sector work. The work in dispute was performed under the overall responsibility of PCL, the general contractor. Although some of the work in dispute shares characteristics with concrete forming in the roads sector, the declarations and other materials filed with the Board establish that the concrete forming work is performed almost identically to that performed inside the hospital. The evidence relating to bargaining patterns establishes that the work in dispute has been performed under the Carpenters' province-wide ICI agreement. The evidence relied upon by the Labourers is considerably weak. The Labourers have not established that a province-wide practice exists of performing this work under roads sector agreements.

58. Accordingly, this proceeding will be determined on its merits on the basis that the work in dispute is ICI sector work.

## Factors Considered by the Board

59. The Board has established a number of factors that it normally considers in order to resolve jurisdictional disputes that arise in the construction industry. The factors normally considered by the Board are the following:

(a) collective bargaining relationships;
(b) trade agreements;
(c) employer practice;
(d) area practice;
(e) safety, skills and training; and
(f) economy and efficiency.

60. Other factors or considerations may also be taken into account by the Board. The Board has stated on many occasions that the significance of any one of the factors identified above will depend upon the circumstances of each proceeding (see, for example, the discussion by the Board in *Ecodyne Limited*, [1997] OLRB March/April 197). In certain cases, some of the factors will be of little importance. In others, those same factors will be determinative.

**Onus**

61. The onus of establishing that the work assignment was incorrectly made lies with the Carpenters. The appropriate standard of proof that must be established by the Carpenters is that stated by the Board in *KEW Steel Fabricators Limited*, 2006 CanLII 2118 (ON LRB). The Carpenters must demonstrate, on a balance of probabilities, that the work in dispute should have been assigned to their members, having regard to all of the relevant factors.

**Collective Bargaining Relationships**

62. As will become evident, the collective bargaining relationships factor is the critical factor for the purpose of determining the appropriate resolution of this work assignment dispute.

63. I have determined that the work in dispute is work that is properly characterized as work performed in the ICI sector of the construction industry. Given that finding, the Carpenters assert that the conclusion to be reached is beyond dispute. Having regard to section 162 of the Act, and the statutory designation made by the Minister of Labour dated June 23, 1997 pursuant to section 158 of the Act, the Carpenters assert that there can be no dispute that its members ought to have had the work in dispute assigned to them.

64. The Labourers acknowledge that the Carpenters Provincial ICI Agreement does cover the performance of the work in dispute if the work is determined to be ICI sector work. However, the Labourers argue that even if the work in dispute is work in the ICI sector of the construction industry, its members are entitled to perform that work pursuant to the Ontario Form Work Association collective agreement.

65. In accordance with the statutory designation made by the Minister of Labour dated September 30, 1983 pursuant to section 158 of the Act, the bargaining relationship between the Formwork Council of Ontario and the Ontario Form Work Association is excluded from that designation. By virtue of a Memorandum of Agreement dated April 1, 2008, Downsview is bound to the Ontario Form Work Association collective agreement. Because the Ontario Form Work Association collective agreement affords members of the Labourers the right to lawfully perform all aspects of concrete forming work in all sectors of the construction industry, including the ICI sector, the Labourers assert that its members employed by Downsview properly and lawfully performed the work in dispute.

66. I do not agree with the position taken by the Labourers. First, no party to this proceeding has asserted at any time that the work in dispute was performed pursuant to the terms of the Ontario Form Work Association collective agreement. As noted by counsel for the Carpenters, the position of the Labourers appears to be that if the work was unlawfully performed under a particular collective agreement there is no issue if that same work could have been lawfully performed under a different collective agreement. That position is fundamentally wrong.

The Labourers are not entitled to use any collective agreement to perform the carpentry portion of concrete forming in the ICI sector because the work could be lawfully performed under the Ontario Form Work Association collective agreement.

67. In addition, however, I disagree with the initial premise of this submission. Although Downsview is bound to the Ontario Form Work Association collective agreement by way of a Memorandum of Agreement dated April 1, 2008, that Memorandum of Agreement when carefully reviewed does not actually cover the performance of the work in dispute. The relevant portions of the recital provisions and the recognition clause of the Memorandum of Agreement state as follows (emphasis added in italics):

> WHEREAS the Employer and the Union both desire to enter into a Collective Agreement with respect to certain employees of the Employer;
>
> AND WHEREAS the Union is entitled to act and the Employer specifically acknowledges the right of the Union to act as exclusive bargaining agent for all construction employees of the Employer in OLRB Geographic Areas 8, 9, 10, 11, 18 and that portion of Area #12, west of the Trent-Severn Waterway, save and except non-working foremen and persons above the rank of non-working foreman, and as further specified within the Collective Agreements referred to herein;
>
> THEREFORE, the Employer and the Union agree as follows:
>
> 1. The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for all its construction employees in all sectors of the construction industry, save and except the ICI sector, *in OLRB Geographic Areas 8, 9, 10, 11 and 18, and that portion of Area #12, west of the Trent-Severn Waterway*, save and except non-working foremen and persons above the rank of non-working foreman, and as further specified within the Collective Agreements referred to herein;
>
> 2. The Employer and the Union hereby agree that under the terms of this Collective Agreement they are bound by all the terms, conditions, provisions, appendices and schedules (including both monetary and non-monetary items) of the Collective Agreements listed below and any renewals thereof, whether made with or without changes by the parties thereto, as if they were original signatories thereto, and the Employer agrees that all work performed, undertaken, sublet to or by the Employer shall be performed in accordance with the terms, conditions, provisions, appendices and schedules (including both monetary and non-monetary items) of the Collective Agreements listed below applicable to that work, *save and except as it is necessary to amend the below-listed Collective Agreements to reflect the Geographic Area of this Collective Agreement*;
>
> ...
>
> (d) "**The Forming Agreement**" being a collective agreement between the Ontario Formwork Association and the Formwork Council of Ontario.

These provisions reflect that the Memorandum of Agreement applies only to work performed in Board Areas No. 8, 9, 10, 11, 18, and a portion of Board Area No. 12. To the extent that the collective agreement between the Ontario Form Work Association and the Form Work Council of Ontario is incorporated by reference into the Memorandum of Agreement as an obligation binding Downsview, the Memorandum of Agreement specifically provides that that collective agreement is to be amended "to reflect the Geographic Area" of the Memorandum of Agreement – namely Board Areas No. 8, 9, 10, 11, 18 and a portion of Board Area No. 12. The work in dispute was performed in Board Area No. 16. The Ontario Form Work Association collective agreement could not apply to the work performed by Downsview at the hospital.

68. Accordingly, the Labourers do not have a collective agreement claim to the work in dispute. The Board's jurisprudence establishes that a trade union without a collective agreement will have a difficult time succeeding with a jurisdictional complaint against a trade union that has a collective agreement with the employer, but that a lack of a relevant collective agreement is not fatal (see *Groff & Associates*, [1994] OLRB Rep. July 846, *Bondfield Construction Company (1983) Limited*, [2002] OLRB Rep. March/April 114, *Brunswick Drywall Limited*, [1982] OLRB Rep. August 1143 and *Pigott Construction Limited*, [1992] OLRB Rep. June 748).

69. In addition to the arguments made above, the Labourers argue that the employer and area practice evidence establish that the Carpenters have abandoned any exclusive jurisdictional claim over the work in dispute, even if the work is determined to be ICI sector work. Accordingly, I consider next the evidence regarding area and employer practice.

## Area Practice

70. Turning first to the factor of area practice, much of the material filed by the Labourers and the Carpenters in support of their assertions with respect to area practice was not helpful, particularly that filed by the Labourers. I have spent considerable time attempting to determine what of the area practice evidence I could safely rely upon.

71. Of the evidence filed, that filed by the Carpenters was the most cogent, though much of its evidence was not helpful. The law is well-settled that except in the most exceptional of cases evidence of area practice must relate to the Board Area within which the work in dispute was performed. Here, the relevant Board Area is Board Area No. 16. Notwithstanding this well-settled legal principle, the Carpenters relied upon area practice evidence of a number of projects in which the work in dispute was said to have been performed by its members in the geographic area serviced by Carpenters Local 2486, an area which extends beyond Board Area No. 16. Magnifying this problem, that evidence consisted of a 14 page "list of projects" drawn from the Local 2486 job order book, with roughly 30 jobs on each page. The list identified the name of the project, the contractor and general contractor, and the date of the project. However, there are no details provided of any of the projects in question.

72. The declaration filed by Mr. Ryan on behalf of the Labourers included an annotated copy of this list of projects. With one exception, Mr. Ryan wrote one of five different responses to each project on the list: "dispute"; "no knowledge"; "no agreement"; "not in 16" or "repeat". There were a large number of notations suggesting that the project did not fall within Board Area No. 16, though it appeared from the limited description on the list that some of those projects may have fallen within the Board Area.

73. At the end of the day none of this evidence provided me with any assistance. There are simply not enough details provided for the evidence to have any use whatsoever.

74. The Carpenters did file some evidence of assistance. Declarations were filed by 25 members of the Carpenters who state that on specific, identifiable projects they performed the carpentry portion of formwork for footings, retaining walls and other concrete structures outside buildings on ICI sector projects under the terms of the Carpenters Provincial ICI Agreement. One hundred and fifty-one projects are referenced in these declarations. During the course of argument it became clear that there were a handful of those projects that fell outside of the ICI sector or that fell beyond the geographic scope of Board Area No. 16. However, for the most part these declarations were not undermined by the Labourers. Some of the projects were performed by Niroc Construction Ltd. or D.J. Venasse Construction Limited. Those two contractors are both bound by the Labourers and the Carpenters Provincial ICI Agreements. Both provided the Carpenters with correspondence that confirmed that the installation of concrete formwork on its projects had been performed by members of the Carpenters, tended to by members of the Labourers.

75. The evidence filed by the Labourers was questionable at its absolute highest. Part of the problem with its materials was definitional, and part of the problem with its materials was qualitative. The Labourers included within its consultation brief a chart containing 24 different projects that its asserts reflects "subcontracts obtained from general contractors bound by Provincial Agreements with the Carpenters, Iron Workers and Labourers" in which the work performed related to "landscape concrete form work outside the ICI building perimeter including the form work carpentry and reinforcing steel portions of all concrete footings, stairs, retaining walls, planter boxes, curbs and sidewalks". The Labourers assert that in each instance the work was exclusively performed by its members, and that the Carpenters never challenged the performance of that work.

76. The definitional issue, of course, is the same one that was referred to earlier in this decision – namely that the construction of stairs, curbs or sidewalks is not included within the work in dispute. Evidence of area practice is only probative of that practice if the evidence offered relates to work that is the same as or is substantially similar to the work in dispute (see, for example, *Foster Wheeler Limited*, [1991] OLRB Rep. August 990, at paragraphs 25, 26 and 30; *Adam Clark Co. Ltd.*, [1992] OLRB Rep. January 6, at paragraphs 24 and 25, and *Sayers & Associates*, 2005 CanLII 3062, at paragraphs 33 to 36). Accordingly, a number of the jobs relied upon as area practice may well have been curb and sidewalk projects that have no relevance to the determination of this work assignment dispute. Regrettably, the Labourers did not provide sufficient details of these projects in its brief to allow for a determination as to what is and what is not substantially similar to the work in dispute.

77. The Carpenters, however, did so, in its reply brief. Of the 24 projects listed, the Carpenters identified five performed by non-union contractors. Two of the remaining projects fell outside of Board Area No. 16. On at least one of the projects (and on perhaps as many as five), the contractor, D.J. Venasse Construction, worked only on curbs and sidewalks. The Carpenters noted that two of the projects were not supported by any declaration, one of the projects was a duplicate of another, one of the projects related to a building that appeared not to exist, and another the Carpenters assert was not performed by the contractor the Labourers assert performed

the work. The Carpenters secured some documentation to support many of its criticisms of the evidence filed by the Labourers.

78. Having reviewed and considered all of the area practice evidence filed by the parties, I conclude that in Board Area No. 16 the work in dispute is almost exclusively performed by members of the Carpenters. This is not surprising, given that the work in dispute is ICI sector work that in the unionized construction industry is almost always performed by members of the Carpenters.

**Employer Practice**

79. The question of the identity of the employer for the purposes of this proceeding was addressed by the parties in their briefs and at the consultation. All parties were prepared to (and did) consider the practice of both PCL and Downsview as employer practice for the purposes of these proceedings. The Carpenters took the position that the practices of PCL and Downsview had little, if any, relevancy for the purposes of this proceeding. It argued that as a general contractor PCL ought to adopt the area practice when coming into Board Area No. 16, and that the employer practice of Downsview was of limited use because it is a single-trade contractor, bound only to a collective agreement with the Labourers.

80. I disagree with the position taken by the Carpenters. Employer practice is always a relevant factor, whether that practice reflects single, dual or multi-trade collective bargaining relationships (see, for example, *Ellis-Don Ltd.*, 2005 CanLII 26978, at paragraph 13).

81. The evidence of employer practice of both PCL and Downsview shared some of the weaknesses of the area practice evidence referred to above. Again, the problem is partly definitional. The work in dispute was defined by PCL in the joint brief it filed with Downsview as "concrete formwork, outside of or on the exterior of the building". In the portion of that brief describing the practice of Downsview, the work in dispute is described as "landscape concrete work outside the building perimeter walls". Neither definition reflects the description of the work in dispute. Here, however, the descriptions of the various projects were at least sufficiently detailed to allow for an appreciation as to how similar the projects were to the work in dispute.

82. Turning first to the practice of PCL, it identified 19 different projects in which it asserted it had subcontracted the work in dispute to a company bound to a collective agreement with the Labourers. The Carpenters challenged a number of those projects. Of the 19 projects, one of the projects listed was the work in dispute. As this is an assignment of work disputed by the Carpenters, it has no weight as evidence of employer practice (see *PCL Constructors Canada Ltd.*, 2010 CanLII 58369, at paragraph 67). One of the projects was the job referred to above at the Baycrest Hospital in which the Carpenters grieved the assignment of the work and PCL settled the grievance in favour of the Carpenters. On one of the projects (the Sudbury Regional Hospital) the Carpenters provided evidence that the actual work in dispute was performed by its members. Counsel for the Labourers conceded that this was the case during argument. On another of the jobs one of the Carpenters' locals filed a grievance regarding the assignment of the work, which again limited the evidentiary value assigned to that project.

83. The Carpenters assert that the vast majority of the remaining projects did not actually involve the performance of work similar to the work in dispute. Its assertion has considerable

merit. A great number of the remaining jobs are described as consisting of "concrete sidewalks and curbs that did not involve or require the placement or installation of reinforcing steel". Descriptions of the work performed on other projects include descriptions such as "curbs, sidewalks, concrete paving, sod, planting. No reinforcing steel" and "sidewalks and curbs, as well as 'seat walls' (that involved the installation or placement of some reinforcing steel), wood fencing and a 'splash pad' or wading/small pool". None of this work is substantially similar to the work in dispute.

84. Of significant interest, PCL identified as one project indicative of its practice a subcontract at the hospital it made to Bianchi, a landscaping and site services subcontractor. It too was contracted to construct "concrete sidewalks and curbs that did not involve or require the placement or installation of reinforcing steel". Bianchi was unable to complete its work. Accordingly, a portion of the work was performed by PCL with direct hires. PCL assigned the carpentry portion of that concrete work to members of the Carpenters. During the course of argument, counsel for PCL acknowledged that if PCL had self-performed the work in dispute it would have assigned that work to members of the Carpenters. PCL, of course, is bound to collective agreements with both the Carpenters and the Labourers, which makes its practice of greater significance.

85. Of the projects listed by PCL that actually reflect work similar to the work in dispute (there are three of them), photographs of the work submitted by the Carpenters make it clear that two of those jobs are not similar to the work in dispute. Accordingly, after careful review the employer practice evidence provided by PCL is quite weak. Having regard to the practice of PCL when it self-performs the work in dispute, its practice is neutral, at the very highest.

86. The list of PCL projects submitted by the Labourers mostly tracks the jobs relied upon by PCL itself. There are two other projects identified on its list that are not contained on the list submitted by PCL. I give them little weight. There is almost no detail identified regarding these two jobs, and the two jobs are said to relate to "landscape concrete form work performed outside the building perimeter which includes the form carpentry and reinforcing steel portions of all concrete footings, stairs, retaining walls, planter boxes, curbs and sidewalks". Again, this is not the work in dispute. Given the lack of a detailed description regarding the actual work performed at these projects, and the fact that the description given does not mirror that describing the work in dispute, no real weight can be attributed to them, particularly when PCL does not itself list these projects as being evidence of its own practice.

87. The practice evidence of Downsview consisted of 25 different projects. The first 19 were performed prior to 2008, and the remaining six were performed between 2008 and 2009. One of the projects during the latter time period was the work in dispute. There were no descriptions provided as to the actual work performed on any of these projects. As noted above, the brief filed by Downsview states that the work performed on these projects was work similar to the work in dispute, which itself is wrongly defined as "landscape concrete work outside the building perimeter walls". Of interest, one of the jobs, performed in 2009 at the Royal Conservatory of Music in Toronto, was a subcontract from PCL. Downsview asserts that the work there was similar to the work in dispute. PCL described the work in its portion of the brief as "exterior concrete slab-on-grade formwork that did not involve or require the placement or installation of reinforcing steel and concrete seat or bench-walls that did involve or require the placement or installation of some reinforcing steel". This was one of the two jobs for which the

Carpenters submitted photographs that show that the work was considerably different in nature than that performed at the hospital.

88. Also of significance is that Downsview first became bound to the Labourers on April 1, 2008 by way of the Memorandum of Agreement referred to above. Presumably the practice evidence relied upon by Downsview that occurred prior to April 1, 2008, which consists of 19 separate jobs, does not reflect a decision by Downsview to assign work to members of the Labourers. There is nothing in the materials filed by Downsview to clarify this question.

89. Considered as a whole, the evidence of employer practice is neutral, as it speaks to PCL, and slightly favours the Labourers, as it relates to Downsview. Downsview, of course, is not bound to a collective agreement with the Carpenters.

90. I return at this point to the assertion made by the Labourers that the evidence establishes that the Carpenters abandoned the work in dispute. The Labourers, PCL and Downsview noted in their submissions that the Carpenters claimed only the retaining walls, their footings and planters in this proceeding. It was asserted by counsel for the Labourers that the Carpenters could not legitimately claim the retaining wall, their footings and the planters as ICI work and not claim the other work that his client performed, such as the sidewalks, curbs and gutters. Counsel therefore asserted that the Carpenters had effectively abandoned any claim it may have had for the latter work. Counsel for the Carpenters disagreed. He asserted that his client had to draw the line somewhere, and that with respect to this particular project, in this particular Board Area, and with these particular employers, his client felt it appropriate to claim the work that it did.

91. The argument made by the Labourers has little significance for the purposes of this proceeding. Drawing lines is a daily occurrence in the construction industry. The Carpenters drew their line for the purpose of this proceeding at footings, retaining walls and planters. The materials before the Board certainly do not establish that the Carpenters abandoned any claim to that work.

**Economy and Efficiency**

92. PCL and Downsview argued that it is neither economical nor efficient for it to subcontract some but not all of the exterior concrete work included in the landscape drawings to a landscape contractor. Similarly, it was asserted that it was neither economical nor efficient for PCL to subcontract some but not all of the exterior concrete work included in the structural drawings to the structural concrete formwork subcontractor.

93. PCL asserted that the companies awarded the structural concrete formwork (Allnue Structures Inc., which performed the concrete forming work, and Harris Rebar, which performed the rebar work) completed that work by October, 2008. It noted that Downsview did not commence work on the wall that surrounds the ramp until April, 2009. The work in dispute is said to represent approximately 1,500 worker hours, or 8.3% of the total subcontract issued to Downsview. PCL states that if the Carpenters claim to the work in dispute is affirmed, Allnue would have been required to re-mobilize its workforce six months after substantially completing a significant majority of its contract – an inefficiency that PCL states is reflected by the fact that no

structural formwork contractor bid for the work in dispute. Of significance, PCL notes that the work in dispute was integrated with work performed by Downsview that is not in dispute.

94. The Labourers reiterated many of these same points in its brief and during argument. It also asserted that the work in dispute was performed intermittently over the 180 work day period within which its states the work was completed. In these circumstances, the Labourers state that employing members of the Carpenters to perform the work in dispute would result in gross inefficiencies. It is asserted that it is more economical and efficient for Downsview to use the Labourers already on site and engaged in sidewalk, curb, gutter, interlocking pavement and soft landscaping to perform the carpentry portions of the concrete formwork at the hospital.

95. The Carpenters dispute the assertions made by the Labourers and PCL. It asserts that the underlying support for the position taken by the Labourers and PCL is absent, in that there are no declarations from any employees who performed the work in dispute. Instead, there is only a statement to this effect made by Mr. Marren in his declaration. In addition, the Carpenters note that the plans and diagrams that identify the work in dispute are dated February, 2009. It states that the work in dispute was performed continuously thereafter by members of the Labourers. The Carpenters see no inefficiency at all in asking its members to perform the work in lieu of those members of the Labourers who did so, given that its members were on site until April, 2009 performing exterior concrete formwork for Allnue relating to the structural contract.

96. I do not accept all of the arguments made by PCL or the Labourers with respect to the economy or efficiency of the work assignment sought by the Carpenters. The assertion that members of the Carpenters were not on site when the work in dispute was performed by members of the Labourers appears to be wrong. There is at least one photograph of the work in dispute included with the materials filed with the Board that shows that members of the Carpenters were on site when the work in dispute was in the midst of being performed. In that regard, certain declarations filed by members of the Carpenters indicate that they worked at the hospital project in 2009 with Allnue; one of them specifically states that the author worked at the hospital project into May, 2009. Although it is not clear how many members of the Carpenters remained on site as at April and May, 2009, it is clear that the Carpenters did have a presence on site when the work in dispute was being performed.

97. I appreciate the argument made by the Labourers that it may be more economical and efficient if Downsview were permitted to use its members already on site and engaged in sidewalk, curb, gutter and landscaping work to perform the work in dispute. The Carpenters make the same argument based upon its members being on site. Even if it would be more economical and efficient to assign the work to members of the Labourers (and I make no finding that it would be), the Board has hesitated to put much (if any) weight on this factor, particularly if the effect of doing so would be to trump collective agreement obligations (see, for example, *Ecodyne Ltd.*, cited above, at paragraph 22).

## Decision on Work Assignment

98. The evidence before the Board establishes that the Carpenters have a very strong claim that its members ought to have performed the work in dispute. It is ICI sector work. The Carpenters have a collective agreement covering the work in dispute, and the Labourers do not. The area practice evidence strongly favours assignment of the work in dispute to members of the

Carpenters. The employer practice evidence filed by the Labourers, PCL and Downsview is weak. It does not reflect that the Carpenters have in any way abandoned its claim to the work in dispute. To the extent that the evidence relating to economy and efficiency might support the assignment of the work in dispute to members of the Labourers, that evidence is hardly strong enough to dislodge the significance of the collective agreement obligations owed to the Carpenters.

99. For the reasons set out above, I conclude that the Carpenters have established on the balance of probabilities that the work in dispute identified above in paragraph two ought to have been assigned to its members rather than to members of the Labourers.

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**2499-09-ES** Harpal Singh, Applicant v. **Rea International Inc. o/a Atlas Fluid Systems** and Director of Employment Standards, Responding Parties

**Employment Standards – The Board considered the criteria for establishing wilful misconduct that would disentitle an employ from receiving termination and severance pay – The applicant employee sought review of an ESO's refusal to award him payment, having found that the employee's incarceration was a product of his own misconduct – The employee argued he was absent against his will, and his circumstances prevented him from being able to call-in his absence, a violation of an explicit company rule – The Board rejected the suggestion articulated in the Ministry of Labour's policy manual that the mere failure to follow a company rule was sufficient to deprive the employee of his or her entitlements under the ESA: the failure must be the result of an intentional action, conscious, deliberate and defiant of the employer's authority – Equally, the employment relationship was not frustrated because the employee's failure to comply with the rule did not seriously interfere with his job duties, and neither his absence nor his inability to call-in could be said to be voluntary – Application allowed**

**BEFORE:** *Ian Anderson*, Vice-Chair.

**APPEARANCES:** *John Villella* and *Harpal Singh* appeared on behalf of the applicant; *Armand Gabriel Pascu* and *Leslie Earle* appeared on behalf of the employer; no one appeared on behalf of the Director of Employment Standards.

**DECISION OF THE BOARD:** November 18, 2010

1. On September 8, 2008, Harpal Singh was incarcerated for non-work related misconduct. As a result he was unable to attend work. He also did not contact his employer to advise it that he would not be able to attend work for his next four scheduled shifts. His employment was terminated on the fifth day in accordance with a company rule which deemed an employee to have quit if he or she failed to attend work and failed to call in for three consecutive days. Mr. Singh states his inability to call in related to the conditions of his incarceration. The employer disputes this but in any event states that Mr. Singh should not be permitted to rely on his incarceration as an excuse, since it is a product of his own misconduct. An employment standards officer determined that Mr. Singh was not entitled to termination or severance pay from his former employer. Mr. Singh brings this application for review of that decision under section 116 of the *Employment Standards Act, 2000,* S.O. 2000, c.41, as amended (the "Act").

2. The parties were able to agree on many of the facts. Mr. Singh gave unchallenged evidence on most of the others. In the result, the facts are not in dispute unless otherwise indicated.

3. Mr. Singh was employed by Rea International Inc. o/a Altas Fluid Systems ("Atlas Fluid" or the "employer") from October 2, 2002 until his employment was terminated on September 15, 2008. A letter of the same date from the employer addressed to Mr. Singh set out the reasons for his termination as follows:

> September 15, 2008
>
> To Harpal Singh, employee # 4430:
>
> You have been absent from the workplace for 6 days, without authorization or calling into notify us.
>
> As per our employee hand book, page 10, Call In Procedure #6.
>
> "As a team member, your presence on time is vitally important. Excessive and/or unexplained absences or failure to follow the call-in procedure may result in progressive discipline and could jeopardize your future with the company. AN [sic] employee, who remains absent and fails to call in after three consecutive working days and has not substantiated the absence to the satisfaction of the company, will be deemed to have voluntarily resigned from his/her employment".
>
> – copy is attached, as well as your signed acknowledgement of the book –
>
> As per the handbook, we accept your resignation from the company effective September 12, 2008.
>
> Regards,
> "Leslie Earle"
>
> Leslie Earle, Human Resources Manager, Atlas Fluid Systems

4. The events surrounding Mr. Singh's termination are as follows. On Monday, September 8, 2008, Mr. Singh completed his shift and went home. He was arrested by the police, charged with an offence in relation to his wife and taken into custody. He was held at the Metro West Detention Centre. He remained in custody until October 10, 2008. The evidentiary record before me is not clear, but it appears that the initial part of Mr. Singh's incarceration related to the fact that he was facing charges with respect to the offence and could not make bail while the latter part of his incarceration related to the fact that he was convicted of the offence. While at the Metro West Detention Centre the only phone to which he had access permitted calls to be made only on a collect basis.

5. Mr. Singh was scheduled to work on September 9, 10, 11, 12 and 15, 2008. Because he was incarcerated he did not attend.

6. When Mr. Singh did not attend at work on September 9, 2008, Ms. Earle was informed by his supervisor. She called a phone number which the employer had for Mr. Singh. She spoke with Mr. Singh's wife. Ms. Earle's evidence with respect to this conversation was that she asked Mr. Singh's wife where Mr. Singh was and Mr. Singh's wife replied that she did not know. Ms. Earle testified that she made other calls and no one answered the phone.

7. Mr. Singh had been directed by the police not to contact his wife. Accordingly, he did not attempt to contact her.

8. The extent of Mr. Singh's efforts to contact the employer is in dispute.

9. Mr. Singh testified that he tried to call the employer on Thursday, September 11, 2008. It was not easy to obtain access to the phone as there were, in his words, three or four big guys there who told him not to touch the phone. When he was able to make a call, it was collect. A receptionist answered the phone. He said he wanted to speak to Leslie, i.e. Ms. Earle. The receptionist said "please hold". After a minute the phone was hung up. He did not get to speak to Ms. Earle.

10. Mr. Singh testified that he tried to call the employer another two or three times on Thursday and another two or three times on the Friday. The number he called is that of his employer. On these occasions he did not get past the Bell "operator" which he also referred to as the "machine". I take this to be a reference to the auto attendant used by Bell to handle such calls. The auto attendant told him that the number called would not accept the charges.

11. Ms. Earle testified that the employer has a policy of picking up all calls. However, when specifically asked whether the employer has a policy with respect to collect calls, she testified that the employer did not have a policy but that if a collect call was made to the Human Resources Department it would be taken "for sure". The receptionist was not called as a witness.

12. Mr. Singh was cross-examined about his evidence that he attempted to contact the employer on the Thursday and Friday. His evidence was consistent and not over stated. There is no direct evidence from the employer to contradict Mr. Singh, as the employer did not call the receptionist. I note in this respect that the employer stated at the hearing that the receptionist was no longer in its employ. This is not a sufficient explanation for the failure to call this witness. It remained open to the employer to compel her attendance if necessary by subpoena. Finally, I note that, as Ms. Earle candidly and fairly conceded, the employer does not have a formal policy with respect to accepting collect calls. As between Mr. Singh's evidence that he attempted to contact the employer, unshaken on cross-examination, and the employer's evidence of an expectation, not reflected by its policies, that a collect call from Mr. Singh would be accepted, I prefer the evidence of Mr. Singh.

13. Mr. Singh testified that during this period of time, because of his marital difficulties, he usually called his parents in India every day. He did not do so during at least the first week that he was in jail. As a result, his parents contacted an Aunt of his in England, who contacted the police in England who in turn contacted the police in Toronto. As a result, the Aunt learned that Mr. Singh was in jail. The Aunt contacted a cousin of Mr. Singh's who lived in Toronto and the cousin came to see him at the jail on the Sunday. Mr. Singh asked his cousin to contact Ms. Earle.

14. Having not heard from Mr. Singh, on Monday, September 15, 2008, Ms. Earle prepared the letter of termination set out above. She waited until 7 AM to see if Mr. Singh would show up for work. When he did not, she sent the letter by courier to a home address that the employer had for Mr. Singh. After she sent the letter, Ms. Earle received a phone call from a lady who advised her that Mr. Singh was in jail. The employer accepts that the lady was Mr. Singh's cousin. The cousin did not tell Ms. Earle how long it would be before Mr. Singh could return and could not have done so as at that point it was not known. The only information which Ms. Earle gave to the cousin was to tell her that Mr. Singh would have to see Ms. Earle. She did not tell the cousin about the letter.

15. Mr. Singh testified that his cousin reported to him that Ms. Earle said that when he got out he should see her and she would help him. Ms. Earle denies making the statement.

16. The copy of the letter which Ms. Earle sent by courier was returned as a "delivery refused". It is not clear from the evidentiary record whether Mr. Singh's wife was living at the address to which the letter was sent at that time. Ms. Earle caused a further copy of the letter to be sent by regular mail. That copy was not returned.

17. Mr. Singh was released from jail on October 10, 2008. He went immediately to his place of employment. He saw Ms. Earle. Ms. Earle gave him a copy of the letter and told him that his employment was terminated because he didn't call the company within 3 days. This was the first time that Mr. Singh had seen the letter and learned that his employment was terminated.

18. Mr. Singh returned to see Ms. Earle two or three times thereafter. On one occasion he was given a Record of Employment which recorded the reason for its issuance as being that Mr. Singh had quit. During these visits, he asked to be rehired, even as a new employee, as he needed a job. Ms. Earle declined. At the time the employer was downsizing its operations and had laid-off approximately 100 employees. These lay-offs had been done in order of seniority. Ms. Earle was not certain whether given his seniority Mr. Singh would otherwise have been subject to lay-off at that time.

19. Mr. Singh was aware of the employer's policy with respect to calling in. He had no prior discipline and no prior record of failing to call in. He had been previously absent for medical reasons for 6-7 months, during which time he followed company procedures.

20. Ms. Earle testified in chief that the employer's absenteeism policy had been enforced in relation to other employees. She was cross-examined about the fact that the policy referenced in the letter provides: "An employee who remains absent and fails to call in after three consecutive working days and has not substantiated the absence to the satisfaction of the company will be deemed to have voluntarily resigned his/her employment." She testified that if Mr. Singh had been absent for medical reasons, she would have reconsidered the decision to terminate his employment because that would have been beyond his control. By contrast, she considered the fact that he was incarcerated as being within his control because it arose from something that he did.

Arguments

21. Mr. Singh argues that his absence was not wilful and his failure to call explained. He notes that this is an isolated incident in his employment history that there is no other occasion on which he failed to follow the employer's rules.

22. The employer argues that it has a clear policy on absenteeism of which Mr. Singh is aware and which was applied to him. More fundamentally, the employer argues that the "nub of the argument" is that Mr. Singh's loss of employment arises from his own wrongful act. It was Mr. Singh's wrongful act in his personal life which resulted in him being unable to fulfill the obligations of his job or even call the employer. The employer acknowledges that its call in policy permits for failure to call in the case of absences substantiated to the satisfaction of the employer, but argues that this must be as a result of an innocent act. It argues that an employee cannot rely on his own misconduct to excuse his inability to call or fulfill the obligations of his job.

Analysis

23. Section 54 of the Act provides employees who have been continuously employed for three months or more with a right to notice of termination or termination pay under the Act. Section 55 provides that prescribed employees are not entitled to termination pay. Regulation 288/01 sets out the employees who are prescribed as not entitled to receive termination pay. Section 2(1) contains two prescriptions from entitlement to termination pay which might be applicable to this case:

> **2.** (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:
>
> ...
>
> 3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.
>
> 4. Subject to the *Human Rights Code*, an employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance.

Paragraph 4 is qualified by section 2(3), which provides that it does not apply if the impossibility or frustration is the result of an illness or injury suffered by the employee. This qualification is not applicable to this case.

24. Similarly, section 64(1) of the Act provides employees who have a minimum of five years of service with a right to severance pay in certain circumstances, acknowledged to be applicable in this case. Section 64(3) of the Act provides that prescribed employees are not entitled to severance pay under the section. Regulation 288/01 also sets out the employees who are prescribed as not entitled to receive severance pay. Subsection 9(1) prescribes from entitlement to severance pay:

> **9.** (1) The following employees are prescribed for the purposes of subsection 64(3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:
>
> . . .
>
> 2. Subject to subsection (2), an employee whose contract of employment has become impossible to perform or has been frustrated.
>
> . . .
>
> 6. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

Section 9(2) provides that paragraph 2 does not apply if the impossibility or frustration is the result of: (a) permanent discontinuance of all or part of the employer's business because of a fortuitous or unforeseen event, the employer's death or the employee's death, if the employee received notice of termination before his or her death; or (b) an illness or injury suffered by the employee. None of these qualifications are applicable to this case.

25. It will be noted that the "wilful misconduct, disobedience or wilful neglect of duty" exceptions to termination and severance pay are identical. I will some times refer to these exceptions collectively as the wilful misconduct, disobedience and wilful neglect of duty exemptions for ease of reference. The "frustration" exceptions are differently worded, however, in my view nothing turns upon these differences in wording for the purposes of this case. Again, for ease of reference I will some times refer to these exceptions collectively as the frustration exemption.

26. Mr. Singh's employment was terminated for violating the following rule:

> An employee, who remains absent and fails to call in after three consecutive working days and has not substantiated the absence to the satisfaction of the company, will be deemed to have voluntarily resigned from his/her employment.

27. There is no question that he remained absent and failed to call after three consecutive working days. There is also no question that he has not substantiated his absence to the satisfaction of the company. Does his breach of this company rule in and of itself mean that he has engaged in wilful misconduct or disobedience so as to deprive him of entitlement to termination and severance pay?

28. The Employment Practices Branch Policy and Interpretation Manual ("EPBPIM") at 19.20.1C 2(a) iii. and 19.20.1C2(b) can be read as suggesting that proof of failure to follow an employer policy is sufficient to constitute wilful misconduct and disobedience respectively, provided the employer proves that its policy meets the following criteria:

> (a) the rule must be clear and unequivocal,

> (b) the rule must have a substantial bearing on the employment relationship (except perhaps in cases of repeated, deliberate infractions of less substantive rules, assuming there is no condonation by the employer),
>
> (c) the rule must have been communicated to the employee,
>
> (d) the employee must know (or ought to know) in advance that the conduct could result in his or her termination, and
>
> (e) the rule must not require the employee to do anything illegal or unsafe.

I note as well that while not expressly referencing these criteria in relation to "wilful neglect of duty" the EPBPIM at 19.20.1C 2(c) states:

> Similar considerations apply with respect to neglect of duty as those that apply with respect to misconduct (see 2(a) above), except that the former concept focuses on the failure to do something, rather than the doing of something.

29. The EPBPIM appears to cite *Re Talbot Inn Ltd.*, April 15, 1982 (Black) E.S.C. 1198 and *Re Glen Erin Animal Hospital*, March 30, 1987 (Baum) E.S.C. 2228 as authority for these criteria. However, a review of these decisions shows that neither in fact constitutes such authority.

30. In *Talbot Inn* the referee did not undertake an analysis of the five criteria identified by the EPBPIM. Further, in concluding that the employee was disentitled from receiving termination pay, the referee considered not only the fact that the employee had breached the rule, but whether there were any "mitigating circumstances".

31. In *Glen Erin Animal Hospital* the referee did not undertake an analysis of the five criteria set out in the EPBPIM. Further, the referee's conclusion that the employee was disentitled from receiving termination pay rested not on the fact that the employee had breached a company rule, but on the fact that the employee occupied a position of trust and had intentionally and repeatedly betrayed that trust.

32. Neither of these decisions constitutes a source for the "company rules" criteria from the EPBPIM set out above.

33. In my view, determining whether or not breaching a company rule constitutes wilful misconduct, disobedience or wilful neglect of duty within the meaning of the exemptions should be approached within the context of the general framework for the application of those exemptions articulated by the Board in *Wal-Mart Canada Corp.*, [2002] OLRB Rep. March/April 275.

34. *Wal-Mart Canada*, it is to be noted, was a "company rules" case, in as much as the employer sought to rely on a breach of its polices requiring an employee to call in advance of any absence as establishing wilful misconduct or disobedience such as would disentitle the employee to termination pay.

35. In *Wal-Mart Canada*, the Board noted that a review of the cases suggested two views as to the meaning to be given to the phrase "wilful misconduct". The Board described the first view as follows:

> 39. One group defines it as a fairly low standard of culpable behaviour. Essentially those referees treated wilful misconduct as any deliberate conduct which the employee ought to have known (from common sense or a previous warning) his or her employer would find unacceptable. Wal-Mart relied on several of those cases: *Re Hunter* [1995] O.E.S.A.D. No. 231; *Talbot Inn Limited*, [1982] O.E.S.D. No. 1198; and *Re Melo* [1996] O.E.S.A.D. No. 208.

It is noteworthy that one of the cases identified by the Board as giving rise to this view, *Talbot Inn*, is one of the cases cited in the EPBPIM with respect to the significance of company rules.

36. This view has been rejected in favour of a second. As observed in *Wal-Mart Canada*, in determining whether or not an employee has engaged in wilful misconduct such as would disentitle him or her to termination (or severance) pay, the Board has adopted the standard set out in *VME Equipment of Canada Ltd.*, [1992] OESAD No. 230:

> Much has been written on the meaning of the words 'wilful misconduct'. It seems to me, however, that that authority can be summarized briefly. In the first place, serious misconduct has to be proven. That is conduct that seriously interferes with either the performance of the employee's job duties or that of his or her co-workers. Normally the Employer would have to demonstrate that harm has been done to its operation and that the misconduct amounted to a repudiation by the employee of the employment contract. There are two general categories of serious misconduct. There will be single acts: insubordination, theft and dishonesty, and physical violence against other employees, for instance, which may, standing on their own, meet that standard of seriousness. As well, there will be less serious repetitive forms of misconduct, which if handled properly by the employer, will also meet this standard of seriousness. The employer, in this scenario, must have explained to the employee after each occurrence that the conduct in question was not acceptable and that if continued would result in termination and there must be, subsequent to these warnings, a culminating incident.
>
> In addition to proving that the misconduct is serious, the employer must demonstrate, and this is the aspect of the standard which distinguishes it from 'just cause', that the conduct complained of is 'wilful'. Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose.

37. It is worth noting that the jurisprudential conclusion that the conduct must be "serious" has been codified in the current regulations to the Act set out above. Those regulations refer to an "employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer". The provisions in the predecessor Acts and regulations which addressed these exemptions did not contain the words "that is not trivial".

38. To echo the EPBPIM, similar considerations apply with respect to neglect of duty as those that apply with respect to misconduct, except that the former concept focuses on the failure to do something, rather than the doing of something. Thus, as stated in *The Aylmer Express Ltd.*, November 14, 1985, (Referee Brown), quoted at paragraph 42 of *Wal-Mart Canada*:

> The "misconduct" or "neglect of duty" referred to in the Act is preceded by the term "wilful". Therefore, it is not sufficient merely to show that an employee was indifferent, casual, thoughtless or neglectful in the performance of, or in the omission to perform, his or her duties or responsibilities. These acts or omissions must be the product of some deliberate or intentional act. The employee must consciously and deliberately engage in some positive act of misconduct or deliberately refrain from performing duties or responsibilities that he or she was required to perform.

39. The issue of "disobedience" also gives rise to similar concerns. As stated in *Wal-Mart Canada* at paragraph 51:

> I come to the same result in applying the word "disobedience". While there is a certain overlap in the dictionary meaning of the two concepts, the rule against redundancies dictates that, for the purposes of subsection 57(10)(c), they must be given different meanings. Indeed, the word disobedience is more consistent with a deliberate act of insubordination. In the one case cited by Wal-Mart, *Montgary Food Enterprises Inc.* [1991] O.E.S.A.D. No. 154 the phrase was defined in contrast to wilful misconduct:
>
>> It was not disputed that the Claimant's conduct was disobedient, within the meaning of section 40(3) of the Act. It should be noted that this subsection does not require that disobedient conduct be wilful, as is required when misconduct or neglect of duty is alleged. In order to successfully support an allegation of disobedience under this section, it must be shown that the employee deliberately disregarded or disobeyed the employer's specific instruction. Given the clear, written policy against drinking alcohol while on duty, which the Claimant admitted having knowledge of, there is no question, that his conduct was disobedient.
>>
>> That is, all misconduct, if the employee has been warned that the behaviour will not be tolerated, contains some form of not following the explicit instructions of the employer. "Disobedience" imports the concept of a deliberate defiance of the authority of the employer, and a conscious decision to challenge that authority. Mr. Gray may have been careless, negligent, and indifferent to his employer's warnings, but there was nothing in his behaviour which constituted a deliberate disobedience in that sense.

40. As observed in *Wal-Mart Canada*, in a claim for termination or severance pay, the Board has no power to reverse the employer's decision to terminate an individual's employment: the concept of "just cause" is not engaged. Nor is the Board determining how much notice an individual is entitled to receive: once the period of the individual's employment is established, the Act establishes universal minimum standards as to the amount of termination and severance pay owing for that period of employment.

41. This limited role of the Board further informs the type of conduct which is required in order to disentitle an employee from termination or severance pay under the Act. As the Board stated in *Wal-Mart Canada* in relation to the term "wilful misconduct":

> 47. .... The word "misconduct" alone is defined by the Oxford Modern English Dictionary (2d ed.) as "improper or unprofessional conduct". That is, it implies some knowledge or sense in the actor of a failure to behave in accordance with a standard. The word "wilful" puts a greater emphasis on conscious, deliberate, intended action which is heedless of any consequences. That is, the Act requires such egregious behaviour that the employee should not be entitled to a period of notice of termination under the Act.

42. In applying this test in *Wal-Mart Canada*, the Board asked itself was the behaviour "so egregious that Wal-Mart could not be expected to permit him to work another two weeks before his termination?" The Board concluded that it was not, stating that there was nothing in his conduct which would have made the individual's presence in the workplace for the period of the notice "untenable". These considerations resulted in the formulation of the following test in *Flamborough Springs Inc.*, [2008] O.E.S.A.D. No. 618 at paragraph 7:

> One measure of whether an employee's offence is sufficiently serious to exclude the employee from entitlement to termination pay is whether it would have been unreasonable to expect the employer to permit the employee to work out his or her notice period under the Act.

43. What, then, is the significance of a company rule or policy? As noted, the EPBPIM suggests that proof of failure to follow an employer policy is sufficient to engage the wilful misconduct, disobedience or wilful neglect of duty exemptions, provided that the employer proves that its policy meets certain criteria. It is convenient to set out again those criteria:

> (a) the rule must be clear and unequivocal,
>
> (b) the rule must have a substantial bearing on the employment relationship (except perhaps in cases of repeated, deliberate infractions of less substantive rules, assuming there is no condonation by the employer),
>
> (c) the rule must have been communicated to the employee,
>
> (d) the employee must know (or ought to know) in advance that the conduct could result in his or her termination, and
>
> (e) the rule must not require the employee to do anything illegal or unsafe.

44. Clearly in order for an employer to attempt to rely upon a rule or policy as a basis for terminating an employee's employment, the rule or policy must not require the employee to do anything illegal or unsafe, must be clear and unequivocal, must have been communicated to the employee, and the employee must know or ought to have known in advance that failure to comply

with the rule could result in his or her termination. That is, criteria (a), (c), (d) and (e) are all necessary conditions. That is not the same thing as saying they are sufficient conditions.

45. The requirement that the rule "have a substantial bearing on the employment relationship" (i.e. criterion (b)) can be understood as another way of conveying that failure to comply with the rule must be shown to having "serious" consequences for the employer, as described in the *Wal-Mart Canada* decision. The "substantial bearing" descriptor, however, does not convey as clearly the need for the consequences to be severe indeed in order to disentitle the employee to his or her right to termination or severance pay.

46. What is particularly problematic with the EPBPIM formulation, however, is the manner in which it addresses the question of intent. The EPBPIM suggests that "failure" to follow a company rule or policy is sufficient. I respectfully disagree. The failure must be the result of an intentional action. Moreover, it must be conscious, deliberate and indeed defiant of the employer's authority. That intention may, in a proper case, be inferred from the employee's action itself, notwithstanding any protestations to the contrary. But the requisite intention must, at the end of the day, be established.

47. I note that there are several recent decisions of the Board which referred to the criteria for a company rule set out in the EPBPIM in concluding that an employee was not eligible for termination pay under the Act. In my view, none of them are inconsistent with the principles which I have just stated.

48. *In Martin Pet Foods*, [2002] OLRB Rep. Jan./Feb. 41, an employer introduced a rule prohibiting the wearing of jewellery in the workplace for reasons of safety. An employee refused to comply with the rule from the time that it was introduced. She was given a verbal warning on the first day; a written warning and sent home on the second day; and a two day suspension on the third day. Upon her return to work following the suspension she again immediately refused to comply with the rule and was terminated. Before the Board, the employee only sought to attack the reasonableness of the rule. The Board declined to enter into this inquiry, noting that the rule met the necessary conditions for such a rule, listing those set out in the EPBPIM. In the result, the claim was dismissed. While the Board did not expressly address the issue, I would note that the employee's defiance to the employer's authority was open, deliberate, repeated and indeed continuous. It would, in my view, have been unreasonable to expect the employer to have permitted her to continue to work during her notice period in these circumstances, since the rule was safety related and further violations would have resulted in her suspension for the balance of the notice period in any event.

49. In *Supply Chain Management*, [2007] OLRB Rep. Sep./Oct. 973 an employee worked in a large distribution centre housing up to $60 million in merchandise. His duties sometimes involved operating battery-powered material handling equipment ("MHE") to move merchandise around the distribution centre, but his main role was to use a very large piece of equipment called a "Battery Bull" to remove spent batteries from the MHE and install fresh ones. The batteries were 2-3,000 lb and acid-filled. He was fired following an accident arising from his operation of the Battery Bull in an improper manner and contrary to the employer's policies. The accident had resulted in one of the batteries falling. Prior to reporting the accident, the employee first moved the battery, contrary to the employer's rules requiring accident scenes to be left undisturbed. The employee had previous discipline relating to improper and unsafe operation of MHE giving rise to

accidents on at least three occasions. On one of those occasions, he was found to have altered the accident scene prior to reporting the accident, contrary to the employer's operating policies. He was specifically warned that further incidents of that kind might result in his termination. His penultimate accident, two months before his discharge, also related to unsafe operation of the Battery Bull in a manner inconsistent with the employer's policies. On that occasion, the employee received a "final warning" with respect to failure to follow the employer's operating policies. The Board found the criteria for employer rules set out in *Martin Pet Foods*, i.e. those which are set out in the EPBPIM, had been satisfied. But the Board also found that the misconduct was "not trivial" and referenced the employee's past conduct.

50. In *StarTek Canada*, [2009] OESAD No. 173 an employee was terminated for violation of an employer's rules and policies in accordance with a system of progressive discipline contained in those rules and policies. The Board found that the rules and policies met the criteria set out in *Martin Pet Foods*, but the Board also referenced *VME Equipment* and found that the employee had deliberately and consciously refused to comply with the employer's direction and policies with respect to one issue and had "flagrantly" disregarded the employer's rules with respect to another.

51. Thus, an examination of *Martin Pet Foods* and the cases which follow it shows that in each of those cases the employee did not simply breach a rule which met the five criteria set out above. The employee's conduct was serious and the employee did so repeatedly, consciously, deliberately and even flagrantly.

52. Before turning to consider the application of the principles identified to this case, I wish to briefly review the few prior Ontario employments standards decisions which have considered whether absence from work or failure to call in as a result of incarceration triggers the misconduct exemption. I am aware of only three.

53. *Caland Ore Company Limited*, January 8, 1980 (Aggarwal) E.S.C. 684 was a case involving an employee who was arrested and detained on charges under the *Narcotic Drug Act*. As a result, he failed to attend work for his next four shifts. At the end of his fourth shift, the employer terminated his employment pursuant to an article in the collective agreement which provided for automatic termination of employment if "an employee is absent from work for a period of four (4) consecutive working days without leave, unless in the judgement of the Company there was a reasonable and substantial justification for such absence". On the fifth day, the employee was released on bail. Some months later, the employee pled guilty to the charges and was sentenced to ten (10) months in an Adult Rehabilitation Centre.

54. At issue was the employee's entitlement to termination pay under the Act. Citing *Re Alcan Canada Products and United Steelworkers*, (1974) 6 L.A.C. (2d) 386 (Shime), Referee Aggarwal rejected the employer's argument that the employee "was guilty of wilful misconduct and wilful neglect of duty in that, as a result of his [criminal] conduct he absented himself from work contrary to the provisions of the collective agreement with full knowledge that such conduct would result in the termination of his employment". Referee Aggarwal concluded that only "misconduct" or "wilful neglect of duty" in relation to the job exempted the employee from entitlement to termination pay. Referee Aggarwal concluded, however, that when the employee "was arrested and detained in police custody and could not report for work, his contract of employment became impossible of performance. It was frustrated ...." While not clear, it appears

that in reaching this conclusion Referee Aggarwal was relying on the four day absence from work as a result of the initial arrest, not the subsequent ten (10) month sentence.

55. As I will describe in greater detail below, and with all due respect to Referee Aggarwal, in my view a four day absence from work does not render a contract of employment impossible of performance nor does it engage the doctrine of frustration.

56. At issue in *Stelco Inc. (c.o.b. Stelpipe)*, [1991] O.E.S.A.D. No. 115 (Cumming) was an employee's entitlement to severance pay. At the relevant time, there was no frustration exemption applicable to severance pay. The employee had been sentenced to 15 months in prison as a result of conviction on drug charges (unrelated to his place of employment). He applied for and was granted his vacation entitlement in relation to the first two weeks of the sentence, but thereafter continued to be unable to report to work because of his incarceration. Two weeks later his employment was terminated pursuant to a provision of the collective agreement which provided for termination if an employee was "absent from work for any reason and does not report ... within two weeks".

57. Referee Cumming referred to the *Caland Ore* decision and also cited Arbitrator Shime's decision in *Alcan Canada Products*. Referee Cumming, however, appears to have concluded that the *Alcan Canada Products* decision supported the conclusion that "an employee who commits intentionally a criminal act beyond the employment (not intending but knowing full well that a consequence of a charge and conviction for the criminal offence may well be incarceration) which results in incarceration that in turn results in involuntary absence from employment is "guilty of wilful neglect of duty"". From this conclusion, Referee Cumming moved directly to the conclusion that the employee was not entitled to severance pay.

58. It will be apparent that Referee Cumming's decision essentially "treated wilful misconduct as any deliberate conduct which the employee ought to have known (from common sense or a previous warning) his or her employer would find unacceptable", in the words of *Wal-Mart Canada*. That is, *Stelco Inc. (c.o.b. Stelpipe)* falls into the first group of cases described by *Wal-Mart Canada*. For the reasons stated above, I reject this analysis.

59. The final case is *Sun Chemical Ltd.*, [1993] O.E.S.A.D. No. 5 (Randall). In that case the employee was "restrained" by police following a heated argument with his wife during which he stabbed himself. He was hospitalized as a result, both to address his self-inflicted physical wound and for a psychiatric assessment. During this period he was unable to report to work. The plant manager contacted him in hospital. Following that first contact, the employer initially placed him on sick leave for about a week. When the plant manager contacted him a second time, around the end of the initial sick leave period, he had been transferred to Metfors for the psychiatric assessment. He was unable to tell the plant manager when he would be released. The plant manager told him that he, the plant manager, would have to speak to human resources. A few days later, by means of a letter sent to his home, the employer terminated the employee's employment for "absence without leave". Approximately three weeks after the termination of his employment he was released from Metfors, pled guilty to a weapons charge and was placed on three years probation. The terms of the probation included seeing both a counsellor and a psychiatrist.

60. On the issue of whether non-work related criminal conduct engaged the misconduct exemption, Referee Randall noted the differing conclusions of *Caland Ore* and *Stelco Inc.* He held, however, that the case before him was not in fact a criminal conduct case but an illness case which led to the employee not being available for work. He concluded that the employee's absence could not be said to be wilful and awarded termination pay. In the result, *Sun Chemical Ltd.* does not assist with respect to the effect of non-work related criminal misconduct on entitlement to termination or severance pay

61. Given the differing conclusions reached in *Caland Ore* and *Stelco Inc.* with respect to the significance of Arbitrator Shime's decision in *Alcan Canada Products*, it is perhaps worth spending a moment addressing that case. The case was one in which an employee was discharged for being absent without leave after the employer refused his request for leave during a period of incarceration. The passage from *Alcan Canada Products* relied upon to give rise to the differing conclusions in *Caland Ore* and *Stelco Inc.* reads as follows:

> While there is a suggestion in the cases that absence from work for a jail sentence is voluntary in the sense that the griever is the author of his own misfortune, in my view it is futile to attempt to characterize the conduct as being either voluntary or involuntary. Quite clearly, unless there are very unusual circumstances, a person does not voluntarily go to jail. It is the sentence of the trial judge that commits him to jail. While that aspect of the situation is clearly involuntary, on the other hand, it is fair to say that the griever may have conducted himself in such a way that he has brought about his jail sentence. In that sense, his conduct cannot be characterized as involuntary. In my opinion, it is more appropriate to describe the events rather than attempt to characterize or classify the conduct.

62. There are a number of points which are important to note about *Alcan Canada Products*. First, and foremost, it is an arbitration decision in which the issue was whether or not there was just cause for discharge. Arbitrator Shime described, if he did not in fact coin, a balancing of interests approach to cases of the sort before him, subsequently followed by most if not all arbitrators. That is, in a repudiation of the approach adopted in some of the arbitration cases which had gone before, Arbitrator Shime concluded that an employer was required to balance its own interests in production against those of the employee in ongoing employment in determining whether or not to grant leave to an employee absent due to incarceration. As discussed above, this is not the issue to be determined under the Act in deciding whether or not the wilful misconduct, disobedience or wilful neglect of duty exemptions are engaged so as to disentitle an employee to termination and severance pay. Second, it is notable that the paragraph concludes with the statement that "it is more appropriate to describe the events rather than attempt to characterize or classify the conduct". The decision was not overly concerned with the characterization or classification of the conduct because it had limited relevance to the "balancing of interests" approach which it adopted. Third, and in any event, the paragraph quoted above was immediately followed by one in which Arbitrator Shime cautioned that different conduct can result in conviction and incarceration, and not all of it can be considered intentional or reckless.

63. I return now to the doctrine of frustration. There is a useful discussion of the doctrine and its application in *E.S. Fox Ltd.*, [1995] O.E.S.A.D. No. 150 (Muir) which in turn relies heavily upon *Orton Driver Services*, March 28, 1977, E.S.C. 411, (P. Picher). Referee Picher makes the following comments which I adopt:

> "Frustration" and "impossible of performance" are technical terms incorporating the common law doctrine of frustration. As a rule of statutory interpretation, when technical terms are used in a statute they are deemed to carry with them their technical meaning unless a contrary intention is indicated. (See E.A. Driedger, The Construction of Statutes at p. 8.) These terms have not been defined by either the Employment Standards Act or the Frustrated Contracts Act, R.S.O. 1970, c. 185 and there appears to be no indication that the Legislature did not intend "frustration" and "impossible of performance" to bear their common law meanings. Reference must, therefore, be made to the circumstances under which a contract is frustrated at common law. In The Law of Contracts, 7th edition, at p. 508 Cheshire and Fifoot make the following general statement:
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> > "... if some catastrophic event occurs for which neither party is responsible and if the result of that event is to destroy the very basis of the contract, so that the venture to which the parties now find themselves committed is radically different from that originally contemplated, then the contract is forthwith discharged. Mere hardship or inconvenience to one of the parties is not sufficient to justify discharge. 'There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.'"
>
> Naturally where the contract itself provides for the contingency, frustration does not occur because the event would bring into operation a term of the contract rather than render the contract impossible of performance. As well, not every event which strikes at the root of the contract will bring into operation the doctrine of frustration. The event must be one that is not the responsibility of either party to the contract as is exemplified by the following list of events or occurrences which have, among many others, been found to frustrate a contract: The physical destruction of the subject matter of the contract by an act of God, or a change in the law rendering the performance of the contract illegal or the non-occurrence of an event upon which the contract was based (like a coronation procession), or the incapacitation of a party to a contract for personal services for reasons that are not within the control of the parties, e.g. numerous instances of death or sickness.[1]
>
> It may be said that there are three preconditions to the operation of the doctrine of frustration:
>
> 1. That the contingency has not been provided for in the contract
> 2. That the supervening event has struck at the root of the contract, and
> 3. That the supervening event was not the responsibility of either party.

64. I am prepared to accept that depending on the circumstances a period of incarceration could be considered as giving rise to "the incapacitation of a party to a contract for personal

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[1] It is important to note again that the frustration exemptions under the Act now specifically do not apply if the impossibility or frustration is the result of illness or injury suffered by an employee.

services for reasons that are not within the control of the parties" and thus give rise to frustration of the contract of employment. (I do note that this conclusion is directly at odds with the argument that an employee absent from work due to incarceration has engaged in wilful misconduct, disobedience or wilful neglect of duty because they knew or ought to have known that their misconduct would have that result. This, however, may be considered an alternative formulation.) However, unless the offence or the commission of an offence can be shown to be inconsistent with the specific employment (as for example, might be the case with respect to a teacher convicted of sexual assault on children), it is not the fact of the offence or incarceration but the length of incarceration which is relevant to such an analysis. The employee's resulting period of absence from employment must cause more than "mere hardship or inconvenience" to the employer so as to strike at the "root" of the contract. There must be no reasonable prospect that the employee will be able to return to work within a reasonable period of time. It must be a period of absence that was not foreseen by the parties.

Application to this case

65. I return to the facts of this case.

66. Given that the rule purports to "deem" Mr. Singh to have quit his employment, I start by observing that essentially for the reasons stated by Arbitrator Shime in *Re Alcan Canada Products and United Steelworkers*, and reproduced above, I find that Mr. Singh did not quit his employment. Quitting employment is a voluntary act. Mr. Singh's failure to comply with the employer's policy cannot be said to be voluntary. It was a product of the fact that he was in jail. He did not voluntarily go to jail: he was arrested by the police, charged, held without bail and ultimately convicted.

67. I find that the frustration exemption does not disentitle Mr. Singh to termination or severance pay in this case. The possibility that an employee of Altas Fluid would be absent without calling for three days was expressly foreseen by the employer's policies. Further, and in any event, I am hard pressed to see how the absence of three days relied upon by the employer, or even the one month before Mr. Singh was released from jail and returned to his place of employment, can be said to have struck at the root of the contract of employment.

68. This leaves the question of whether Mr. Singh's breach of the rule constitutes "wilful misconduct, disobedience or wilful neglect of duty" within the meaning of the exemptions to the Act so as to disentitle him to termination and severance pay.

69. For ease of reference, I set out again the rule whose breach the employer relies upon to support its discharge of Mr. Singh:

> An employee, who remains absent and fails to call in after three consecutive working days and has not substantiated the absence to the satisfaction of the company, will be deemed to have voluntarily resigned from his/her employment.

70. Turning first to the five criteria for such a rule set out in the EPBPIM, there can be little question that the rule in question meets all of them. It is clear and unequivocal. The failure of employees to attend work for three consecutive days without calling in has a substantial bearing

on the employment relationship. The rule had been communicated to Mr. Singh. Mr. Singh knew from the rule itself that violation of the rule could result in termination of his employment. Finally, the rule did not require Mr. Singh to do anything unsafe.

71. Does, however, Mr. Singh's breach of this rule constitute wilful misconduct or disobedience such as would disentitle him to termination and severance pay under the Act? As described in greater detail above, this requires that the employer establish two things: that the employee's failure to comply with the rule seriously interferes with either the performance of the employee's job duties or those of his or her co-workers; and that the employee purposefully breached the rule knowing that doing so was serious misconduct, neglect of duty or was disobedient, and deliberately and consciously disobeyed the authority of the employer. In my view, the employer in this case has failed to establish either of these things.

72. First, the employer led no evidence with respect to how Mr. Singh's absence and failure to call in for three consecutive days interfered with its operations. I have no doubt that there was some interference and would be willing to infer this conclusion even in the absence of evidence. But I am unable to infer in the absence of any evidence that this single act by Mr. Singh constituted serious interference with the employer's operations.

73. Second, the necessary element of volition is absent in this case. It may be fair to conclude that Mr. Singh knew or ought to have known that criminal misconduct on his part could result in a period of incarceration which would render him incapable of attending work. It may even be the case that an employee who commits an act of criminal misconduct which he or she knows or ought to know could result in a prolonged period of absence can be said to have purposefully breached a rule of required attendance knowing that doing so was serious misconduct, neglect of duty or disobedience and can be said to have deliberately and consciously disobeyed the authority of the employer. That, however, was not the reason why Mr. Singh's employment was terminated and accordingly I do not decide those questions.

74. Mr. Singh's employment was terminated after only five days of absence. Further, his employment was terminated not simply because he was absent, but because he failed to contact his employer to advise that he would not be at work. Mr. Singh's inability to contact his employer arose not from the fact that he was incarcerated but from the fact that he had limited access to a telephone, the telephone only permitted collect calls and, as I have found, the employer did not accept those collect calls. He did not purposefully breach the rule. His failure to call was not deliberate. He did not consciously disobey the authority of his employer. On the contrary, he attempted to comply with the rule but was thwarted in his ability to do so.

75. In the result, Mr. Singh is entitled to termination and severance pay.

76. The workplace parties agreed that at the time of the termination of his employment, Mr. Singh's regular wages were $603.20/week. Having regard to the fact that Mr. Singh's period of employment was October 2, 2002 until September 8, 2008, he is entitled to five weeks termination pay and five and 11/12 weeks severance pay. The total amount owing is $6,584.93.

Disposition

77. For the reasons stated, I find that Rea International Inc. o/a Altas Fluid Systems owes Harpal Singh $6,584.93 in termination and severance pay. Rea International Inc. o/a Altas Fluid Systems is to pay this amount to the Director of Employment Standards in trust for Harpal Singh. If this amount is not paid within 30 calendar days of the date of this decision, this decision will become an order to pay in favour of the Director of Employment Standards in trust for Harpal Singh, attracting the statutory administrative fee of $658.49. The total amount of the order to pay will be $7,243.42. In addition, interest will be payable at the rate and calculated in the manner determined by the Director under subsection 88(5) of the Act.

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**2222-10-R** Service Employees International Union Local 1 Canada, Applicant v. **Royal Victoria Hospital**, Responding Party

**Certification – Practice And Procedure – Representation Vote – In this application for certification, an issue arose regarding whether or not the failure to segregate ballots should cause the Board to exercise its discretion to order a second vote – The applicant failed to provide its scrutineer with a list of challenges at the vote; consequently, the voters' list used did not note the applicant's challenges – The applicant subsequently signed off certifying that the balloting was conducted fairly – At the Regional Certification Meeting, the parties agreed on the status of five individuals whose names appeared on the applicant's list of challenges, but whose ballots had not been segregated; the parties agreed that three of those individuals were not employees in the bargaining unit – The vote was counted at 83 against the applicant and 81 for, meaning the three ballots of the non-employees could be determinative of the application – Second vote ordered**

**BEFORE:** *Ian Anderson*, Vice-Chair.

**APPEARANCES:** *Gail Misra, Ken Evett* and *Fatima Vieira* appearing for the applicant; *Shane Smith, David Coward, Susan Sedgman* and *Richard Greco* appearing for the responding party.

**DECISION OF THE BOARD:** November 23, 2010

1. This is an application for certification under the *Labour Relations Act, 1995*.

2. By decision dated October 14, 2010, the Board (differently constituted) directed the taking of a representation vote and that the ballot box be sealed until the parties agreed or the Board ordered otherwise. Subsequent to the vote, the parties were able to resolve most of the issues in dispute as between themselves. The parties continued to have a dispute about whether the failure to segregate certain ballots at the time of the vote should cause the Board to exercise its discretion to order a second vote pursuant to section 111(5) of the Act.

3. By decision dated November 19, 2010, the Board ordered the taking of a representation vote on November 25, 2010 "for reasons to follow if requested". By letter dated November 22, 2010, the responding party requested reasons be provided and that the ballot box be sealed until it

had an opportunity to review those reasons. These are the Board's reasons. The ballot box will not be sealed.

4. A hearing was held on November 15, 2010. It was conducted on the basis of agreed or undisputed facts, except as identified in this decision.

5. The representation vote was held on October 18, 2010. Prior to the vote, the responding party had provided the Board with a list of all individuals who fell within the voting constituency defined by the Board. On that list, the responding party identified certain individuals whom it asserted should not be included in the bargaining unit. That is the responding party had provided its "list of challenges" as part of the voters' list which it provided to the Board.

6. The applicant had its own list of challenges. There was a great deal of overlap between the applicant's list of challenges and those of the responding party, but they were not identical. The applicant did not file a copy of its list of challenges with the Board in advance of the day of the vote. Rather, the applicant's usual practice is to bring its list of challenges to the vote and provide it to the Returning Officer conducting the vote.

7. Ken Evett is an organizer for the applicant. Mr. Evett's evidence would be that when he arrived at the room in which the vote was to be held, he went up to Michel Perrier, a Returning Officer of the Board whom he recognized. He introduced the applicant's scrutineer for the vote, Fatima Vieira, to Mr. Perrier, and gave Mr. Perrier a copy of the applicant's list of challenges. Mr. Perrier in turn introduced Lyndsay Fulton as a Returning Officer in training who would be conducting the vote.

8. Ms. Vieira's evidence would be that she saw Mr. Perrier take the applicant's list of challenges, turn around, walk to a table and open a folder. She did not see what Mr. Perrier did with the applicant's list of challenges at that point.

9. The responding party is not prepared to accept that the applicant did in fact give a copy of its list of challenges to the Returning Officers on the morning of the vote. In its view, if that fact is material the Board should consent to the calling of the Returning Officers as witnesses.

10. There is no dispute that at the time of the vote the applicant did not give the responding party a copy of the applicant's list of challenges.

11. Prior to the commencement of the vote, Mr. Evett left the room, as he was to pull the vote. Ms. Vieira was given a copy of a voters' list (the "Voters' List") by one of the Returning Officers. The Voters' List was the list which had been filed by the responding party. As the parties subsequently learned, the applicant's additional challenges had not been noted on that list. Ms. Vieira did not have a copy of the applicant's list of challenges.

12. The vote was conducted. Two hundred and twenty nine (229) individuals cast ballots, including sixteen (16) individuals not on the Voters' List ("NOL"). The ballots of those sixteen individuals were segregated, plus the ballot of one individual mistakenly identified as not on the Voters' List. In addition fifty-one (51) of the ballots cast by individuals on the Voters' List were segregated. Five (5) individuals who appeared on the applicant's list of challenges but not the responding party's list of challenges cast ballots which were not segregated. It is this fact which

gives rise to the issue in dispute addressed by this decision. The applicant raised some concerns with respect to other ballots, but these are not material given my view of this matter. Further there were some other issues with respect to the conduct of the vote which are the subject of a section 96 complaint filed by the applicant (Board File No. 2613-10-U), but they are not relevant for the purposes of this decision.

13. Following the vote, Ms. Vieira signed a "Certification of Conduct of Election" (Form B-86) for the applicant. That document states in part:

> We the undersigned, acted as scrutineers for the parties herein in the conduct of balloting at the date and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

14. Mr. Evett returned by the conclusion of the vote. He signed the "Certification Worksheet" on behalf of the applicant (the "Worksheet"). On the page for signatures, the Worksheet contains the following statement:

**THE PARTIES ARE ADVISED THAT**
**THEY ARE BOUND BY THE**
**AGREEMENTS MADE AND SET OUT IN THIS REPORT**

15. The Worksheet contains a list under the heading "Voters' List Issues" (the "VLI List"). This list had been pre-populated with the names of the individuals on the responding party's list of challenges. The names of the sixteen individuals who were not on the Voters' List and the name of the one individual mistakenly identified as not on the Voters' List who had shown up to vote had been added by hand. The names of the applicant's additional challenges, and in particular the names of the five individuals which it had challenged and who had shown up to vote, were not on the VLI List.

16. The Worksheet also includes pre-printed agreements as to the disposition of the application which may be checked off by the parties as appropriate. These agreements appear under the heading "At the Vote or Post-Vote Where the Ballots Have Been Counted". The ballots were not counted at the vote. This section of the Worksheet was not completed by the parties.

17. A few days following the representation vote, the applicant realized that its list of challenges was not reflected on the Voters' List. It filed its post vote submissions in a timely way on October 25, 2010 and in those submissions stated:

> [I]t appears as though five (5) of the applicant's challenges to the voters' list did not have their ballots segregated as requested. The applicant submits that this may be material to the outcome [of] the representation vote and, as such, may bring the representation vote itself into question.

18. A Regional Certification Meeting was held on November 10, 2010. At the Regional Certification Meeting, the parties were able to resolve many of the issues in dispute between themselves and these agreements were reflected on the Worksheet. In particular, the parties agreed upon a bargaining unit description and on the status of all of the individuals on the VLI

List. While incorrectly marked on the Worksheet, the responding party also agreed to withdraw its section 8.1 objection with the result that the ballots might be counted. While not marked on the Worksheet, or recorded in any document signed by the parties, there is no dispute that the parties also agreed on the status of the five (5) individuals whose names appeared on the applicant's list of challenges but whose ballots had not been segregated as described above. The parties agreed that two of those individuals were employees within the bargaining unit and three of those individuals (Ms. Wyborn, Ms. Campbell and Ms. Waite) were not employees within the bargaining unit.

19. The ballots (including those of Ms. Wyborn, Ms. Campbell and Ms. Waite which were irretrievably intermingled with the other ballots) were then counted: 81 ballots were cast in favour of the applicant; 83 ballots were counted against the applicant; and 1 ballot was spoiled.

20. The effect of the failure to segregate the ballots of Ms. Wyborn, Ms. Campbell and Ms. Waite (the "three ballots") is thus squarely raised.

21. The applicant argues that the Board should exercise its discretion under section 111(5) of the Act to direct the taking of a second representation vote as the application should not, indeed cannot be dismissed for two reasons.

22. First, the applicant argues that it assumed, and was entitled to assume, that the Returning Officer had noted on the Voters' List the additional challenges from its list of challenges. Assuming without deciding that the applicant did provide the Returning Officer with a copy of its list of challenges on the morning of the vote, this argument has no merit.

23. In the ordinary course, the Board does attempt to prepare an "agreed upon" voters' list for use by the Returning Officer and the parties at the vote and that voters' list does indicate the names of any individuals whose status is challenged by either party. In this case there was not an agreed upon voters' list showing the challenges of both parties: there could not have been given that the applicant did not provide a copy of its list of challenges to the responding party.

24. Whether or not there is an agreed upon voters' list, the obligation to ensure that challenges are made, however, rests with each of the parties. The fact that in this case Ms. Vieira was unable to do so because she did not have a copy of the applicant's list of challenges is irrelevant. The responsibility for ensuring that a scrutineer is in a position to perform his or her function lies with the party on whose behalf the scrutineer acts. It was the applicant which failed to provide its scrutineer with a copy of its list of challenges.

25. Further, Ms. Vieira, on behalf of the applicant, certified that the balloting was conducted fairly. The fairness of the balloting includes ensuring that ballots are properly segregated. To the extent that Ms. Vieira was unable to assess whether the balloting was conducted fairly, this again arises from the failure of the applicant to provide her with a copy of its challenges.

26. I note that this conclusion is entirely consistent with the conclusion reached by the Board in *Ghods Builders Inc.*, [2005] O.L.R.D. No. 584, a case relied upon by the responding party.

27. In support of its first argument, the applicant relies upon several cases in which the Board ordered a second vote as a result of problems with the first vote. The first is *Mollenhauer Limited*, [1990] O.L.R.D. No. 1293. That case is distinguishable. In that case, the problem with the first vote was the result of a matter within the exclusive control of the Board: the failure of the Board to have a ballot available for an eligible voter who wished to cast a ballot. In this case, by contrast, for the reasons stated above the responsibility to ensure the proper segregation of the three ballots which it challenged lay with the applicant.

28. The second case relied upon by the applicant is *Clean Water Works Inc.*, 2008 CanLII 45321 (ON. L.R.B.). That case is also distinguishable. In that case, in ordering the vote, the Board had ordered each of the ballots cast to be segregated. The ballots cast were not in fact segregated. While the Board ordered a second vote, the decision does not set out its reasons for doing so. I note, however, that in ordering a second vote the Board was giving effect to the order which the Board had made in the decision directing the vote. It was not merely giving effect to the rights or interests of one of the parties, which had not been asserted in a timely way at the vote, as the applicant seeks in this case.

29. The third case relied upon by the applicant is *MN Electric Company Ltd.*, 2010 CanLII 26794 (ON L.R.B.). In that case, the applicants failed to give adequate notice to a proper party to the proceedings. That party intervened and sought a second vote in order to put it in the same position it would have been in had it been provided with proper notice. The Board directed the second vote on this basis. There is no factual analogy to this case.

30. The applicant's second argument rests on section 10(2) of the Act. It is convenient to set out both that section and section 10(1) of the Act:

> **10.** (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.
>
> (2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

31. The applicant relies upon the November 10, 2010 agreement of the parties that the individuals who cast the three ballots in question were not employees in the bargaining unit. Given this and given that the outcome of the vote was 83 against the trade union and 81 for the trade union, the applicant argues that the Board cannot conclude that "50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union" and dismiss the application pursuant to section 10(2) of the Act.

32. In a letter dated November 18, 2010, the responding party argues that the hearing on November 15, 2010 in effect proceeded on the basis of the union's "best case" and therefore the section 10(2) argument "is only relevant and can only be addressed by the Board in the context of the Union's claim that the vote was improperly conducted by the Board due to its handling of the Union's challenges". I disagree. The hearing on November 15, 2010 proceeded on the basis of

certain facts which were undisputed and the applicant union's "best case" with respect to the other facts. Parties are free to make whatever legal arguments they wish on the basis of facts before the Board. The applicant's section 10(2) argument rests on the undisputed fact that at the Regional Certification meeting the parties agreed that there were three ballots in the ballot box which had been cast by individuals who were not employees in the bargaining unit and on the results of the vote.

33. The responding party argues that the applicant is bound by the actions of its scrutineer at the vote, citing *Ghods Builders Inc.*, op cit. Further, it notes that the Board has held that in order to protect the integrity of the vote process, other than in exceptional circumstances parties should not be permitted to resile from the positions which they have taken with respect to voter eligibility at the time of the representation vote, citing *Halminen Building Corporation (Clarington),* 2003 CanLII 26027 (ON L.R.B.). Thus, the responding party argues that the applicant is also bound by the fact that its representative signed a Worksheet which did not list the status of the three individuals who cast the three ballots as being in dispute.

34. The responding party also cites *Swissline Industries Limited*, 2004 CanLII 47361 (ON L.R.B.) and *Midtown Meats Cold Storage Ltd.*, [2002] OLRB Rep. Nov./Dec. 1117. It is convenient to start with those two cases.

35. In *Midtown Meats*, the ballots were counted following the vote. The applicant lost. The parties completed the portion of the certification worksheet described earlier in this decision which appears under the heading "At the Vote or Post-Vote Where the Ballots Have Been Counted". In particular, the parties checked off a box by which they agreed that the application would be dismissed. Subsequently the applicant sought to challenge the conduct of the vote and sought certification under section 11 of the Act. The Board would not permit this, because it would have meant permitting the applicant to resile from the agreement which it signed on the certification worksheet that the application be dismissed. The Board was not prepared to permit the applicant to resile from its agreement.

36. In this case, by contrast and as earlier noted, the portion of the Worksheet which appears under the heading "At the Vote or Post-Vote Where the Ballots Have Been Counted" was not completed. The applicant by signing the Worksheet at the time of the vote did not agree that the application would be dismissed.

37. *Swissline Industries Limited* bears some factual similarities to the present case. In that case the responding party failed to challenge the status of three individuals at the time of the vote, with the result that their ballots were not segregated and were intermingled with two others. All five ballots were counted: three were marked in favour of the applicant and two against. Subsequent to the vote, the responding party took the position that the three individuals in question were not in fact employees within the meaning of the Act. The responding party argued that in the result the application should be dismissed pursuant to section 10(2) of the Act.

38. The Board noted that the responding party's argument was premised on an assumption as to the manner in which the three individuals in question had voted. The Board noted that it could not make that assumption. The Board continued:

> In the circumstances, it may in fact be necessary to hold a fresh representation vote if the Board were to allow the responding party's challenges to proceed and any one of them were successful.
>
> [emphasis added]

39. The Board, however, decided that it would not permit the responding party's challenges to proceed. In doing so the Board noted the concern about the potential of allowing the ballots of non-employees determine the outcome of the application for certification. But the Board concluded that this concern was outweighed by the prejudice to the opposing party and the prejudice to the Board's administrative resources created by the responding party's failure to raise its challenges in a timely way.

40. If the issue before me were whether or not to permit the applicant to proceed with its challenges to the three individuals whose ballots it failed to ensure were segregated in a timely way, I would reach the same conclusion. However, that is not the issue before me. The responding party has agreed to the applicant's challenges to these three individuals. Those challenges have been, in the words of the Board in *Swissline*, "successful".

41. It is not a matter of the Board relieving the applicant from the actions of its scrutineer, as the Board declined to do in *Ghods Builders Inc.*, nor is it a matter of the Board permitting the applicant to resile from positions taken by its representative in signing the Worksheet, as the Board declined to do in *Halminen Building Corporation (Clarington)*. It is the parties' subsequent agreement reached at the Regional Certification meeting that the three individuals were not employees in the bargaining unit which has the effect of releasing the applicant from the consequences of its actions and positions at the vote. Further, the Board is faced not just with the "potential" that non-employees have cast ballots which were included in the count, as was the case in *Swissline*, but with the certainty that if effect is given to the results of the October 18, 2010 vote, non-employees have cast ballots which were included in that count, and could be determinative.

42. The responding party argues that such a conclusion would have the effect of discouraging parties from agreeing to settle status issues at Regional Certification meetings. It notes that in this case, the parties agreed that all individuals in certain classifications, including classifications held by the three individuals in question, were properly excluded from the bargaining unit. It was consequential on that agreement that the parties agreed that the three individuals should be excluded from the bargaining unit.

43. I am unable to agree. The parties could have structured their agreement in any number of ways. In any event, the responding party's argument amounts to saying that the Board should give effect to the first agreement of the parties but not the second. There is no reason to do so. As more fully articulated at paragraph 22 of the *Midtown Meats*, in order to ensure certainty, the Board has consistently declined to look behind the agreements of the parties with respect to the status of individuals. Thus, as outlined above, the Board would not have looked behind the positions and agreements of the parties at the time of the vote with respect to the status of individuals either agreed "in" or "out". Equally, the Board will not look behind the subsequent agreement of the parties that the three individuals whose ballots are at issue are out. What the Board is doing is simply giving effect to that agreement. The effect of that agreement is that three

of the ballots counted in this case were cast by individuals who are not employees in the bargaining unit. Given the outcome of the vote, those ballots may be determinative.

44. Given this, the Board is unable to satisfy itself that more than 50 per cent of the ballots cast in the representation vote cast by employees in the bargaining unit were cast in favour of the applicant trade union in order to certify the applicant under section 10(1). Equally, the Board is unable to satisfy itself that 50 per cent or less of the ballots cast in the representation vote by employees in the bargaining unit were cast in favour of the trade union in order to dismiss the application under section 10(2). Further, unlike in *Midtown Meats*, there is no agreement by the parties that the application be dismissed

45. The Board notes that it has received letters from a number of individuals asserting that they have been subject to unwelcome approaches by the applicant and taking the position that effect should be given to the results of the first vote. These letters do not appear to have been copied to either the applicant or the responding party. In any event, they do not and cannot change the Board's conclusion set out in the preceding paragraph.

46. In the result, I can see no alternative but to order a second vote pursuant to section 111(5) of the Act. That vote was ordered by the decision of the Board dated November 19, 2010.

47. As the responding party had the opportunity to address all of the issues discussed in this decision, and indeed did so during the hearing on November 15, 2010, there is no reason to seal the ballot box.

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**3581-09-U Sheryl Anne Toop**, Applicant v. Canadian Union of Public Employees and CUPE Local 1974, Responding Parties

**Conflict of Interest – Duty of Fair Representation – The applicant claimed that the trade union had breached its duty of fair representation when it refused to pursue her termination grievance to arbitration – Previous to the applicant's discharge, the Local had filed suit against the applicant for defamation in an unrelated incident – The applicant was granted representation by the National union and a favourable legal opinion was prepared – The Local union representative intervened and fresh evidence was acquired which was not shared with the author of the previous legal opinion; instead it was given to a new author and an unfavourable opinion was produced – All parties were able to address the membership at the grievance arbitration vote but no mention was made by the local rep of the contradictory legal opinion; a vote of the membership was held and it was decided that arbitration was not appropriate given the circumstances – The Board held that there was a conflict of interest between the applicant and the Local union due to the pending law suit and that the Local union had breached their duty of fair representation when there was no mention by the Local union of the legal opinion favourable to the applicant nor were any actions taken to distinguish the two opinions at the membership vote – Application allowed; Board ordered the grievance to arbitration**

**BEFORE:** *Patrick Kelly*, Vice-Chair.

**APPEARANCES:** *Sheryl Toop* for the applicant; *Alison Dewar, Louis Rodrigues* and *Ken Bethune* for CUPE Local 1974; *Nancy Rosenberg, Christopher Schulz* and *John Lepine* for Canadian Union of Public Employees; and *David Ross* for Kingston General Hospital.

**DECISION OF THE BOARD:** November 8, 2010

1. This is an application under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") alleging that the responding party trade unions breached their duty of fair representation as described in section 74 of the Act.

**Background**

2. This complaint concerns the handling of the applicant's termination grievance by the responding parties. The applicant (or "Ms. Toop") says the conduct of both responding parties in the processing of the grievance and the decision not to refer it to arbitration demonstrated arbitrariness, discrimination and bad faith.

3. Both responding parties contend that there was no breach section of section 74.

4. At the outset of the consultation, counsel for the Canadian Union of Public Employees ("CUPE" or "CUPE National") asserted as a preliminary matter that it was not the bargaining agent of the bargaining unit to which Ms. Toop belonged, and that therefore the Board is without jurisdiction to determine if it breached section 74. I entertained submissions by Ms. Toop and by counsel for CUPE, and ruled that CUPE's position was correct, with brief oral reasons. Following my ruling, CUPE decided not to participate further in the consultation, and the inquiry proceeded to deal with the question whether or not CUPE Local 1974 ("Local 1974" or "the Local"), Ms. Toop's bargaining agent at the time of her dismissal, had breached section 74.

**The Facts**

5. Ms. Toop commenced employment with Kingston General Hospital ("the Hospital") on April 30, 2007 as a Part-Time Medical Secretary in the Obstetrics and Gynaecology Department. She was elected as a union steward and executive board member of the Local in late April 2008. She was dismissed from employment on June 15, 2009. The relatively short period of her employment was marked by a number of confrontations with the executive of the Local. She initiated three applications before the Board. Each of the Local executive have joined as individual plaintiffs in a civil lawsuit against the applicant, alleging defamation as a result of a document she distributed about alleged financial mismanagement by the plaintiffs. The lawsuit was initiated in late March 2009, about three months prior to Ms. Toop's discharge, and remains unresolved. In addition, prior to her termination, Ms. Toop was successfully prosecuted for internal breaches of the CUPE constitution.

6. This application is the third one she has brought before the Board seeking relief against the Local and against CUPE. In Board File No. 3407-08-M Ms. Toop raised concerns about the adequacy of the Local's financial statements, and had some limited success in that matter, in the sense that, in response to that application, the Local ultimately arranged for and provided Ms. Toop with a certified copy of a financial statement prepared by a firm of chartered accountants.

7. Board File No. 3274-08-U involved another duty of fair representation complaint arising out of a disciplinary warning issued by the Hospital to Ms. Toop for initiating a heated discussion with the Local's President, Louis Rodrigues, concerning campaign literature in support of his re-election to union office. During that confrontation, which took place in the Hospital's cafeteria, Ms. Toop took issue with the truth of what the President was claiming in his campaign flyer. Mr. Rodrigues complained of harassment to the Hospital, as did the Local's Vice President, Ken Bethune, in connection with some other alleged conduct on the applicant's part apparently having to do with the election to union office. The Hospital carried out an investigation and eventually determined that Ms. Toop was not guilty of harassment of either union official, but the Hospital disciplined Ms. Toop with a written warning for having engaged in the hostile conversation with Mr. Rodrigues in a public area of the Hospital. The Local grieved the written warning, but eventually abandoned it on the advice of counsel. In my decision dated January 6, 2010 I found that the Local did not violate section 74, and I dismissed Ms. Toop's application.

8. As I have indicated, in this, the third application, Ms. Toop's complaint against the union arises in the context of her dismissal from employment. It would appear that the Hospital's decision was made sometime after its representatives met with Ms. Toop on April 30, 2009 to discuss the Hospital's concerns. Ms. Toop had the right to representation by the Local in that meeting, but she declined it.

9. The reasons for the Hospital's decision bear noting.[1] The Hospital alleged that Ms. Toop was guilty of fraud, breach of trust, breach of Hospital policy and unacceptable work performance. More specifically, the Hospital alleged that Ms. Toop improperly claimed paid union business leave in order to attend at her consultation in Board File No. 3274-08-U referred to in the preceding paragraph. Secondly, Ms. Toop was alleged to have spent time during working hours on the Internet doing personal business. Thirdly, the Hospital claimed she prepared a non-work related document on Hospital equipment during working hours. Fourth, Ms. Toop was alleged to have incorrectly cross-referenced patient documents. Finally, the Hospital alleged that Ms. Toop inappropriately removed from the workplace confidential patient information and then referred to that information in e-mail correspondence from her home computer to the Hospital.

10. In response to her termination, Ms. Toop filed her own grievance in both her capacity as grievor and union steward, which Local 1974 subsequently adopted without objection by the employer. She also turned to the CUPE National Representative, John Lepine, for assistance with her grievance in anticipation of a meeting with the Hospital at Step 2 of the grievance procedure. National Representatives' participation at Step 2 meetings must be agreed to by the Local union. Local 1974 consented to Mr. Lepine's participation, and further agreed that he would speak to Ms. Toop's grievance at the meeting.

11. The grievance proceeded to a Step 2 meeting with the employer, Ms. Toop, Mr. Lepine and Mr. Bethune on August 5, 2009. It would appear undisputed that Mr. Lepine spoke at length on behalf of the applicant, and requested of the Hospital production of documents in support of the decision to terminate the applicant. The Hospital representative either refused to provide it or took the request under advisement. In any event, no documents were produced that day.

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[1] No party provided the Board a copy of the letter of termination. I have gleaned the Hospital's reasons from legal opinions furnished by both CUPE's and Local 1974's counsel in the course of the grievance procedure.

12. On August 10, 2009, the employer denied the grievance.

13. In response to a request by the Local through Mr. Lepine, CUPE's legal department gave a written legal opinion in the fall of 2009 about the prospects of Ms. Toop's grievance. Legal counsel, Sue Lott, recommended that the union proceed to arbitration. In doing so, she had access to fairly limited information which she described as "documentation related to the termination and grievance provided to me by you [Mr. Lepine]". Counsel conceded that she did not know if there was a strong evidentiary case for the Hospital's allegations against Ms. Toop, but she was quite clear that, based upon the case law, "none of the allegations, *even if proven, either individually or collectively* constitute just cause for imposing the ultimate disciplinary penalty of termination." (emphasis added) Moreover, counsel noted that Ms. Toop's work record was clear but for one warning (for her outburst in the cafeteria), and suggested that termination was a disproportionate response in the context of the principle of progressive discipline. She concluded by stating there were "strong grounds for referring the termination grievance to arbitration."

14. Once the Local received CUPE's legal opinion, Mr. Bethune asked the Hospital to provide further particulars of the allegations against Ms. Toop. The Hospital complied by providing Mr. Bethune with further information, including a copy of notes made by a Hospital representative present at the investigation meeting with Ms. Toop on April 30, 2010. Apparently, the Hospital also informed him of the results of an audit it had done over the course of three months on the utilization of Ms. Toop's computer. Mr. Bethune in turn provided the information to counsel to Local 1974, Susan Ballantyne, for the purpose of obtaining a second opinion Ms. Ballantyne reviewed the information and apparently was given access by the Hospital to look at certain other information having to do with the alleged breach of patient confidentiality.

15. On October 29, 2009, Ms. Ballantyne sent two e-mails to Ms. Toop. She informed Ms. Toop of the Local's decision to seek a legal opinion from her. To that end, she offered Ms. Toop an opportunity to meet with her that afternoon or the following day so that Ms. Ballantyne might obtain Ms. Toop's version of events. Approximately one hour later, Ms. Ballantyne sent a second e-mail in which she advised that the Local would be deciding whether to refer the termination grievance to arbitration at the next membership meeting "scheduled for this weekend". Apparently, Ms. Toop had been suspended from membership at the time, and consequently Ms. Ballantyne advised her that she was not eligible to attend the meeting, but could provide a written statement in support of referring the grievance to arbitration, which would be read at the meeting. In the alternative, Ms. Ballantyne advised that if Ms. Toop was concerned about the short notice, the issue of her grievance could be deferred to the next membership meeting.

16. It is not clear what, if any, response Ms. Toop made to Ms. Ballantyne, but in any case, her grievance was not dealt with at the next membership meeting, and when it eventually did come up for discussion in January 2010, Ms. Toop was present at the membership meeting. At the consultation before me, Mr. Bethune explained that since Ms. Ballantyne's legal opinion was not ready for the late October membership meeting, the Local executive decided not to deal with the issue at that meeting. Mr. Bethune also explained that the Local's practice was to consult the membership only when the executive committee recommended not proceeding to arbitration with a termination grievance.

17. On November 22, 2009 Ms. Ballantyne e-mailed to Ms. Toop a letter outlining her concerns about the additional information received from the employer through Mr. Bethune's intervention. She asked Ms. Toop a series of questions related to it, and to the employer's grounds for dismissal as set out in the termination letter. Ms. Toop responded in some detail with her explanations. She admitted that some of computer time at work had been spent on personal business. She did not express any regret in that regard. This response prompted further inquiries by Ms. Ballantyne. Apparently, Ms. Toop replied that she stood by the answers she had previously provided Ms. Ballantyne.

18. On or about January 11, 2010, Ms. Ballantyne issued a lengthy written legal opinion for the Local, which was co-signed by another lawyer in Ms. Ballantyne's law firm. It appears that in preparing the opinion, Ms. Ballantyne read Ms. Lott's opinion. Ms. Ballantyne and her colleague concluded that an arbitration of Ms. Toop's termination grievance would not likely succeed. The chief reason appears to be that, based upon the more recent information received from the employer (as well as copies of e-mails provided by Ms. Toop herself in a human rights complaint made against the Hospital and the union), Ms. Ballantyne and her colleague were convinced the employer was in a strong position to prove time theft on a significant scale. Moreover, in her opinion, Ms. Toop's relatively short seniority and lack of remorse were factors that mitigated against the likelihood of reinstatement.

19. The Local executive considered Ms. Ballantyne's legal opinion and decided not to proceed with Ms. Toop's grievance to arbitration. It decided to have the membership vote on the issue. On or about January 16, 2010, Mr. Bethune notified Ms. Toop in writing of Ms. Ballantyne's opinion and the Local executive's decision to recommend to the membership, on the basis of that opinion, that the grievance not proceed further. He invited her to attend the membership meeting on January 25, 2010 and to address the membership if she wished. Prior to that membership meeting, Ms. Toop requested and was provided copies of both the CUPE legal opinion and Ms. Ballantyne's legal opinion.

20. At the January 25, 2010 membership meeting, Mr. Bethune summarized Ms. Ballantyne's legal opinion for the benefit of the attendees. He did not refer to Ms. Lott's opinion, although Ms. Toop did when it came her turn to address the membership. So did Mr. Lepine, who also addressed the membership. He commented that he took no issue with Ms. Ballantyne's opinion, that he too had concerns about the merits of the grievance, that the case might not be a "winner", but that, in his opinion, Ms. Toop's grievance should proceed to be heard by an arbitrator.

21. The membership voted, and by a majority, accepted the Local executive's recommendation not to refer Ms. Toop's grievance to arbitration.

## Analysis

22. Section 74 of the Act reads:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of

> the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

23. In *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] C.L.L.C. ¶14,043 at p. 12,188 (S.C.C.) the Supreme Court of Canada described a set of principles of the duty of fair representation as it pertains to a trade union's treatment of a grievance. Those principles are:

> 1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.

24. In my view, Local 1974 started out on the right foot in terms of its treatment of Ms. Toop's grievance. It adopted the grievance she filed as its own, and it agreed that, in the circumstances, Ms. Toop ought to have the benefit of representation by Mr. Lepine from CUPE National's office. Given the history between Ms. Toop and the Local's executive, this was the prudent thing to do. And at least initially, Mr. Lepine was given free rein to act on Ms. Toop's behalf. He clearly was her spokesperson at the August 5, 2009 grievance meeting. He was the one to request production of documents in support of the Hospital's decision to terminate Ms. Toop. The Local adopted more or less an arm's length role.

25. In normal circumstances, Local 1974 might have asked its own legal counsel to provide it with a legal opinion. That appears to have been the routine in other cases involving the termination of bargaining unit employees. But these were not normal circumstances. Ms. Toop and the Local found themselves frequently in adversarial proceedings. And, of course, each member of the Local executive had joined together in their personal capacities to sue Ms. Toop in a civil action. So, once again, the Local took the prudent route, and requested through Mr. Lepine a legal opinion from CUPE National's legal office. What the Local received was a legal opinion that unequivocally and strongly recommended that Ms. Toop's case should proceed to arbitration. Admittedly, Ms. Lott did not have all the information necessary to assess the strength of the Hospital's evidence against Ms. Toop. But even so, Ms. Lott appears to have been persuaded that, regardless of that evidence, there was a solid argument to be made before an arbitrator that the Hospital's response in terminating the applicant was excessive, and without cause.

26. It is at this stage that Mr. Bethune, on behalf of the Local, intervened in Ms. Toop's grievance, whereas previously he had deferred to Mr. Lepine and the CUPE legal department. Mr. Bethune took it upon himself to seek out the Hospital's representative for the purpose of assessing the strength of the Hospital's documentary case against Ms. Toop. And having succeeded in that regard, Mr. Bethune did not provide the information to Ms. Lott, for a re-assessment of her opinion, but to Local 1974's counsel, Ms. Ballantyne, for a fresh look. In the routine case, it would have been quite appropriate for Mr. Bethune to have sought out Ms. Ballantyne's opinion as that was the Local's normal practice. But again, this was not a routine case involving the termination of just any bargaining unit member. The Local had recognized as much when it agreed to the involvement in the matter by Mr. Lepine and Ms. Lott. In the absence of a compelling reason, the insertion of Mr. Bethune into the grievance process, and his efforts to obtain another legal opinion from a different source, raises an inference that Local 1974 hoped to overcome Ms. Lott's advice to proceed to arbitration.

27. This inference is further bolstered by the rather odd timing of the scheduling by the Local of Ms. Toop's grievance before the general membership in late October 2009. By this time, Local 1974 had received Ms. Lott's legal opinion to proceed to arbitration, and apparently had retained Ms. Ballantyne to prepare her opinion, which did not issue until several months later. It was the Local's practice to consult the membership on recommendations by the executive committee not to proceed to arbitration with termination grievances. Why, then, was Ms. Toop's termination grievance on the agenda of the October membership meeting? Mr. Bethune explained that the Local executive had anticipated it might be in possession of Ms. Ballantyne's opinion by the time of the October meeting. When that proved not to be the case, the agenda item was deferred to a future membership meeting. In my view, this is not an entirely satisfactory clarification. The placement of the referral of Ms. Toop's grievance to arbitration on the October agenda suggests the possibility that a preliminary view had been taken by the Local executive at that stage not to proceed to arbitration.

28. I have no specific information concerning the content of the Local executive's deliberations that resulted in the decision not to proceed to arbitration. In the absence of that information, it would appear that the sole basis for the decision was Ms. Ballantyne's opinion. But at that point, the executive had two legal opinions, reaching different conclusions, with which to contend. There is nothing in the Local's pleadings to suggest that the executive committee carefully considered this dilemma, or made any attempt to reconcile the recommendations of counsel. This is borne out by what happened at the January 2010 membership meeting. In support of the executive committee's recommendation not to proceed to arbitration, Mr. Bethune summarized the content of Ms. Ballantyne's opinion to the membership. He did not go into any detail concerning Ms. Lott's opinion, or provide any further rationale for the executive committee's recommendation. This supports the view that the Local executive did not take into account all the information relevant to the issue to be decided.

29. In dealing with Ms. Toop's grievance, the members of the Local executive were in a conflict of interest arising from their lawsuit against her. It was incumbent upon the union's officers not to allow their personal interest in their litigation against Ms. Toop to influence how the Local dealt with her termination grievance. Their actions must be scrutinized carefully in light of that conflict of interest. In my view, their conduct cannot be said to constitute fair representation of Ms. Toop's interests. Having agreed at the outset that Ms. Toop would best be served by Mr. Lepine in the grievance process, and having sought the legal opinion of CUPE

National, it seems to me that Mr. Bethune, perhaps with the support of the other Local executive, undermined the very process that would probably have ensured an objective assessment of the question of the referral of the grievance to arbitration, by inserting himself into the grievance process. I am not satisfied there was a legitimate reason for his intervention, given that Mr. Lepine had been given the responsibility to steer Ms. Toop's grievance. Nor was there a satisfactory reason offered for putting Ms. Toop's grievance on the agenda of the October membership meeting. Finally, the executive committee did not appear to turn its mind to the conflicting legal opinions.

30. I am satisfied that Local 1974 breached section 74 of the Act.

31. This leaves the question of remedy. The Board orders that, notwithstanding any time limits or any other provisions of the collective agreement binding upon Local 1974 and the Hospital, Ms. Toop's grievance is to be referred forthwith by Local 1974 to arbitration pursuant to section 49 of the Act. Furthermore, Ms. Toop is entitled to participate in the selection of legal counsel to represent the union at the arbitration hearing. To that end, the union is to present to Ms. Toop within ten days of the date of this decision the names of five lawyers from different law firms from which she may choose one. The union is solely responsible to pay the lawyer's legal fees associated with the arbitration, at the lawyer's normal billing rate.

32. I remain seized should there be any difficulties implementing this decision. I also remain seized to deal with any issue of apportionment of damages as between the Hospital and the union should damages be awarded by the arbitrator.

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**1950-10-U; 2854-10-M** United Food and Commercial Workers Canada, Local 1000A, Applicant v. **Sobeys Inc.**, Responding Party

**Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The employer terminated an inside organizer for soliciting employees during working hours – The union brought an application for interim reinstatement – The employer maintained the reason underlying the discharge of the employee was the fact of solicitation during working hours (and the previous warning given) and not the subject matter of the solicitation (to join the union) – Given the lack of a no-solicitation policy upon which it could rely and the employer's apparent tolerance shown for other discussions during working time, the Board found it appeared unlikely that the inside organizer would have been terminated had he been soliciting for any other cause – It therefore appeared to the Board that the termination was the result not simply of soliciting during working hours, but at least in part because he was a known and active organizer on behalf of the union – The four criteria under s. 98(2) having been met, the Board ordered interim reinstatement – Interim Relief granted**

**BEFORE:** *Ian Anderson*, Vice-Chair.

**APPEARANCES:** *Jeffrey M. Andrew, Patrick Groom, Ryan White, Dustin Magee, Corrado Squeo, Wavtej Grewal* appearing for the applicant; *Jonathan Maier, Corolyn Cornford,* *Craig Smith, Shobha Boodram, Carlos Gouveia, Joe Rizzi* and *Brandon Serrano* appearing for the responding party.

**DECISION OF THE BOARD:** December 17, 2010

1. On September 16, 2010, Local 1000A filed an unfair labour practices application under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") with respect to actions of Sobeys (Board File No. 1950-10-U). That application related in part to actions of the employer with respect to Corrado Squeo. On November 23, 2010 Sobeys terminated Squeo's employment. By letter dated November 30, 2010 the union sought to amend its unfair labour practice complaint, inter alia, to allege that the termination of Squeo's employment was in breach of the Act. Leave to amend that application is hereby granted. That application is not otherwise addressed by this decision.

2. Board File No. 2854-10-M is an application for interim relief under section 98 of the Act. It was filed on November 30, 2010. It seeks, as interim relief in the pending unfair labour practices application, the reinstatement of Squeo along with other orders in support.

3. It appears from the response filed to the application for interim relief that the correct name of the responding party is: "Sobeys Inc." The style of cause is hereby amended accordingly.

4. In accordance with the Board's Rules of Procedure, the parties filed declarations and submissions in relation to the application for interim relief. The union filed declarations from Squeo and from Dustin Magee, an organizer employed by the union. The union alleges that the employer terminated Squeo's employment because he was a key and active supporter of a union organizing campaign at its Vaughan Retail Support Centre ("Vaughan RSC"). The employer filed declarations from Carlos Gouveia (the operations manager of the facility), Shobha Boodram (the human resources manager), Brandon Serrano, Lawrence Chan, Julius Galarde and Joe Rizzi (all employees at the Vaughan RSC). The employer asserts that Squeo's employment was terminated for repeatedly violating its policy of no-solicitation during working hours. It states the fact that Squeo was soliciting for union membership was not relevant to its determination.

5. A consultation was held on December 10, 2010. The Board permitted each of the parties half an hour to cross examine which ever of the opposing party's declarants they wished, and ten minutes to conduct re-examination of any declarants so cross examined. The purpose of this was not to permit the Board to make determinations of credibility, but rather an attempt to clarify points on which the declarations filed by the parties appeared to be directly at odds.

6. Section 98(2) sets out four conditions which must be met before the Board may grant interim orders under section 98(1)(b) or (c). Section 98(3) establishes a further condition which must be satisfied before the Board may grant such interim orders. I will address the condition established by section 98(3) first, followed by the four conditions set out in section 98(2).

**The Board shall not exercise its powers under clause (1)(b) [interim reinstatement] or (c) [interim orders with respect to the terms and conditions of employment of an employee who has not been terminated] if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee: s. 98(3).**

7. This condition requires the Board to determine whether it "appears" that the impugned actions of the employer were not causally related to the exercise of rights under the Act: *Patrolman Security Services Inc.*, [2005] OLRB Rep. Sept./Oct. 818, at paragraph 52. This determination is not a finding of fact, rather it is based on a "preliminary assessment of the quality or robustness of the evidence likely to be heard and tested in the pending application": *Patrolman* at paragraph 67. In making this determination, the Board will have regard to all of the material before it to determine how the explanation offered by the employer fits with the conduct alleged by the union and whether there appear to be any gaps in either the conduct complained of or the explanation: *K2 Electrical Contracting Ltd.*, [2006] OLRB Rep. May/June 375 at paragraph 44.

8. Sobeys cites *G&K Services Canada Inc.*, [2007] O.L.R.D. No. 696 and *Princess Gardens Retirement Residence*, [2010] O.L.R.D. No. 719 on the interpretation and application of this section. It appears to suggest that these cases modify or further define the scrutiny to which the Board will subject the materials before it for the purposes of the determination under section 98(3).

9. In *G&K Services Canada Inc.* the Board noted that in making the determination of whether there was an appearance that the impugned actions of the employer were not causally related to the exercise of rights under the Act, the Board was not engaged "in an exhaustive inquiry, as we would when we get to deciding the unfair labour practice complaint". This observation contrasts the nature of the inquiry under section 98(3) with the nature of the inquiry under section 96. The latter, in general, will take the form of a full hearing of viva voce evidence. The former is determined in an expedited process suited to the determinations which the Board is called upon to make. It does not change the degree of scrutiny to which the Board will subject the materials before it.

10. Sobeys suggests that *G&K Services Canada Inc.*, at paragraph 15, stands for the proposition that "where an employer has provided a plausible explanation for the personnel decision at issue, subsection 98(3) of the Act will operate to defeat a request for interim reinstatement". Sobeys appears to imply that the prima facie plausibility of the employer's explanation is decisive; that it need not be weighed against the allegations made by the union for the purposes of determining whether there was an appearance that the impugned actions of the employer were not causally related to the exercise of rights under the Act. I do not agree with this proposition, or this interpretation of *G&K Services Canada Inc.* It is clear, when reference is had to paragraph 14 of that decision, that the Board was weighing all of the material before it in arriving at its conclusion.

11. Similarly Sobeys suggests that *Princess Gardens Retirement Residence* stands for the proposition that "so long as the employer's evidence is "unmarred by obvious inconsistencies or contradictions that might cause one to suspect a connection between the dismissal and an unlawful purpose", the employee's interim reinstatement is necessarily precluded by the proper application of section 98(3) of the Act". Once again, with respect, Sobeys has attempted to elevate the Board's description of the employer's material before it in one case to the level of principle. A review of the decision as a whole makes it clear that the Board considered all of the material before it in arriving at its conclusion that it appeared the impugned actions of the employer were not causally related to the exercise of rights under the Act.

12. I turn now to consider whether, on the basis of all of the material before me in this case, it appears that the impugned actions of the employer were not causally related to the exercise of rights under the Act.

13. The Vaughan RSC is a distribution centre at which Sobeys receives product from suppliers and repacks it for distribution to its stores. Squeo commenced employment at the Vaughan RSC on or about November 19, 2009. He held the classification of Picker/Utility.

14. It appears that Squeo contacted the United Food and Commercial Workers Canada in or about July 2010. In early August 2010 he, and three other Vaughan RSC employees, met with Magee, who as noted is an organizer with Local 1000A. They discussed commencing an organizing drive at Vaughan RSC. Squeo signed a union card at that time, as did the other three.

15. Squeo and Magee declare that Magee instructed Squeo and the others not to distribute union membership cards during work time or to discuss the union during working hours. Sobeys' declarants, not surprisingly, have no knowledge of these instructions. Squeo declares that he followed these instructions. As will be seen, Sobeys disputes that fact.

16. Squeo and Magee also declare that Squeo was responsible for collecting all signed union cards and delivering them to Magee. Squeo declares that in the first three weeks of the organizing campaign approximately 22 of the approximately 98 warehouse employees that the union was seeking to organize signed cards.

17. On September 9, 2010, Squeo was called to the Human Resources office with the operations manager Gouveia. Gouveia alleged that he had received several complaints from employees that Squeo had approached them during working hours to sign a union card. Squeo denied these allegations. Squeo asked Gouveia to provide him with specifics of who had made these allegations. Gouveia declined to do so. Instead, Gouveia provided Squeo with a letter recording the fact that he was receiving a "verbal warning". The text of the letter is as follows:

> September 9, 2010
>
> Mr. Corrado Squeo
>
> Dear Corrado:
>
> As discussed, in today's meeting with you, we have had several complaints from employees that you have approached them during working hours to sign a union card. Solicitation of employees of any sort during working hours is not permitted in our Facility, nor is it authorized by the Labour Relations Act. This activity during working hours is to cease immediately.
> This letter will be placed in your file as a "Verbal Warning". Any further action of this nature will be subject to further discipline up to and including termination of your employment.
>
> In addition, those same employees have advised that your approaches at work are bothering them and have requested that you leave them alone. Please respect the wishes of your colleagues.

18. Sobeys filed declarations from two employees which it states were the ones whose complaints gave rise to the September 9, 2010 letter: Serrano and Galarde.

19. Galarde declared that Squeo had approached him during working hours and asked him to sign a union card. Galarde declared that he was "bothered" by this behaviour.

20. Serrano declared that he told Gouveia that Squeo had "approached me several times while I was working in order to get me to sign a union card". Serrano told Gouveia that he was "upset and intimidated" by this behaviour. Serrano also stated that on one occasion Squeo told him "if a union was brought into the Vaughan RSC, I would be able to work shorter hours and that I could tell the Team Leader to "fuck off" and that the union would protect me if I did".

21. In his September 9, 2010, letter, his declaration and his answers to questions put to him during the consultation, Gouveia placed no reliance upon the fact that Squeo had allegedly told Serrano that the would be able to tell the Team Leader to "fuck off" if the union were brought in. Rather, Gouveia maintained that the reason Squeo was given the "verbal warning" was because Squeo had approached other employees during working hours to sign a union card. The letter and Gouveia's declaration also make reference to the fact that the employees approached were "bothered" or "upset" by Squeo's approach.

22. Gouveia's declaration states that "no employee is permitted to solicit their colleagues for any purpose during working hours". Gouveia declares that "any type of solicitation deters employee productivity and is prohibited". In contrast to Sobeys' anti-harassment policy, Gouveia's declaration does not suggest that this no-solicitation policy is "express". A copy of any no-solicitation policy is not part of any of the materials filed by Sobeys. During the consultation Gouveia stated that he had not reviewed any such policy or looked at its details prior to meeting with Squeo on September 9, 2010. He stated he didn't even know if there was a written policy. He stated that he had talked to one of Boodram's predecessors as human resources manager, Mr. Smith, prior to meeting with Squeo on September 9, 2010 and had relied on what he had been told. What Mr. Smith told Gouveia is not before me. The information before me as to what any such policy provides is unclear at best. During the consultation, Gouveia clarified that "working time" did not include lunch or break periods. However, he was uncertain as to whether the policy would prohibit solicitation when an employee was walking from a meeting back to the picking floor even though that fell during working time. More significantly, there is no information before me with respect to any prescribed disciplinary consequences for breaching any such policy. There is no suggestion that any such policy has been brought to the attention of employees or that it is consistently enforced.

23. This lack of clarity with respect to any no-solicitation policy is of significant concern.

24. The materials filed by Sobeys also suggest that Gouveia's decision to impose the verbal warning on Squeo for soliciting during working hours was in part a product of the fact that Galarde was "bothered" by the approaches and Serrano was "upset and intimidated" by Squeo's behaviour. Sobeys has included a copy of its anti-harassment policy in its materials. The difficulty with this is that it appears that Galarde and Serrano were not concerned with the solicitation but with the subject of the solicitation. Each complains that "several times" Squeo asked if they wished to join a union, nothing more. Galarde's declaration does not even indicate that he ever told Squeo that he was not interested in joining a union. Being asked on occasion

whether one is interested in joining a union is not harassment. While some employees may not wish to belong to a union there is nothing wrong with another employee asking them if they wish to join. The Act does not authorize such discussions during working hours, but neither does it prohibit them: see *Metro Toronto Convention Centre Corporation*, [1999] OLRB Rep. Jul./Aug. 640 at paragraph 35.

25. The Vaughan RSC contains a fenced in area, known as the "Repack Area" which houses valuable goods including gum, cigarettes and confectionaries. On September 10, 2010, the day after Squeo received his verbal warning, he was "transferred" to work in the Repack Area and only transferred back to the general warehouse area on or about November 8, 2010. Squeo declared that only two employees at a time work in the Repack area. He identified "Rajeesh" as the individual he worked with, and described him as vocally anti-union. He declared that while he was in the Repack area, the union's organizing campaign ground to a halt. Squeo declared that from his date of hire at the Vaughan RSC in November 2009 until his transfer on September 10, 2010, he had been employed as a General Warehouse employee.

26. Sobeys states that there is no such thing as a "General Warehouse Employee" at the Vaughan RSC. Rather, there are four classifications of employees, the one being held by Squeo being that of "Picker/Utility". It takes issue with Squeo's use of the term "transfer" and states that Picker/Utility employees rotate in and out of the Repack Area on a regular basis. It also notes, and Squeo agreed during the consultation, that Squeo had applied for training in relation to the Repack area in July, 2010. It also disputes that Squeo worked with only one other employee during this period of time, stating that the individual identified by Squeo as "Rajeesh" transferred from Squeo's afternoon shift to night shift on October 4, 2010. It also states that at least three employees ordinarily work in the Repack Area at the same time. It states that employees who work in the Repack Area "are not isolated as a group, to the exclusion of the rest of the workforce".

27. What Sobeys does not challenge, however, is Squeo's claim that this was the first time that he had been assigned to work in the Repack Area as part of the employee complement in that area. Sobeys does not claim that Squeo was assigned to work in the Repack Area as part of some regular rotation of employees in and out of the area. Sobeys does not claim that September 10, 2010 happened to be the date on which Squeo would otherwise have been assigned to work in the Repack Area in response to his earlier expression of interest. In fact, Sobeys does not provide any explanation as to why Squeo was assigned to work in the Repack Area starting on that particular day: it does not specifically deny the obvious inference that the assignment was related to the previous day's discipline of Squeo for soliciting employees with respect to union support during working time.

28. Nor does Sobeys challenge Squeo's claim that he was kept in that area for six weeks. Further, it appears obvious to me that employees assigned to work in the Repack Area have less interaction with other employees, at least during working hours: presumably the whole point of having a secure area is to exclude other employees for the purposes of stock control.

29. Squeo declared that after his September 9, 2010 discipline, and while he was in the Repack Area, several co-workers told him that they feared being seen talking or sitting with him for fear of being suspected of union activity. While previously he regularly ate lunch with several other employees, he now often ate alone.

30. While Squeo worked in the Repack Area, Joe Rizzi was his Team Leader. As noted, Sobeys filed a declaration from Rizzi. Rizzi declares that he did not observe Squeo being ignored by his colleagues. Indeed, Rizzi declares, "I needed to remind Squeo that he needed to focus more on his job performance, rather than continuing to converse with his colleagues during his working hours". Rizzi's declaration makes specific reference to "an altercation" which he had with Squeo on September 18, 2010. In essence, Rizzi confronted Squeo on three occasions during the course of the day about the fact that Squeo was having conversations with co-workers during work time. On two of these occasions Squeo responded with what Rizzi considered to be inappropriate comments. There is no suggestion that Squeo was discussing the union in any of these conversations. Rizzi states that he "decided" not to discipline Squeo in relation to these comments. It appears that Rizzi also did not discipline Squeo for having repeated conversations with his co-workers during working time. This decision is perplexing given that it appears from Gouveia's declaration Sobeys prohibits solicitation during working hours because "it deters employee productivity". Nonetheless, Rizzi made detailed notes in relation to these events, a copy of which is attached to Rizzi's declaration. There is no suggestion that this kind of note taking is part of some regular practice followed by Rizzi.

31. The unexplained timing of Sobeys' assignment of Squeo to work in the Repack Area where, by definition, his movements and interactions with other employees would be more limited, coupled with the fact that Rizzi appears to have been keeping records in relation to Squeo, support the inference that Sobeys wished to limit Squeo's ability to solicit support for the union, at least during working hours.

32. As noted, on or about November 8, 2010, Squeo was assigned to work back in the general warehouse. He declares that between November 4 and 16, 2010 approximately seven more union cards were signed. On November 16, 2010 he was elected to be the employee representative on the Workplace Health and Safety Committee.

33. On November 23, 2010, Squeo was called into the Human Resources office again by Gouveia. Boodram was present and took notes. Gouveia alleged that he had received several more complaints from employees that Squeo had approached them during working hours to sign a union card. Gouveia asked Squeo whether he had done so. Squeo refused to answer. Squeo asked Gouveia to provide him with the names of the individuals making these allegations. Gouveia declined to do so. Squeo stated that he would not comment on the recent complaints that had been made against him. Gouveia asked Squeo if he would provide any information in relation the employer's investigation. Squeo repeated that he would not do so unless provided with the names of those who had complained. Squeo was asked to leave the office for a few minutes so that Gouveia and Boodram could discuss the matter. Upon his return, Boodram asked Squeo whether he had been soliciting union cards during working hours. Squeo declined to answer. Gouveia provided Squeo with a letter recording the fact that his employment was being terminated. The text of the letter is as follows:

> Dear Corrado,
>
> As discussed, in today's meeting with you, we have had several complaints from employees that you have been soliciting them to join a union during working hours. As we previously indicated to you on September 9, 2010 in your Verbal Warning, solicitation of employees of any sort during working hours is not permitted in our Facility, nor is it authorized by the Labour

> Relations Act. This activity is considered insubordination as you were directed not to do this, however you continued to do so even after being warned.
>
> As discussed with you, this letter will confirm your termination from Sobeys Vaughan Retail Support Centre, effective immediately. All monies owing to you, including your final pay and any outstanding vacation pay accrued, up to and including your last shift worked, will be paid to you in the usual course.
>
> Your record of employment will be forwarded electronically to Human Resources and Social Development Canada (HRSDC) following your final pay.

34. Sobeys filed declarations from three employees which it states were the ones whose complaints gave rise to the November 23, 2010 letter: Serrano, Plummer and Chan.

35. Plummer declared that Squeo approached him once during working hours to discuss the union and tried to give him a union card. Plummer states "I did not want to discuss these things with Corrado during working hours". He does not state that he told Squeo to stop.

36. Chan declared that when he worked together with Squeo, Squeo approached him while he was working and asked him whether he wanted to join a union. He declares that he did not say anything to Squeo. He states that he was "intimidated" by Squeo (and also by another co-worker who had asked him several times if he wanted to join a union). Being asked several times if he wished to join a union is the only conduct of which he appears to complain.

37. As with the earlier examples, it appears that Plummer and Chan were not concerned with the solicitation but with the subject of the solicitation: they were asked if they wished to join a union. Again, this is not harassment. As stated before, while some employees may not wish to belong to a union there is nothing wrong with another employee asking them on occasion if they wish to join.

38. The third complaint was from Serrano. Serrano states that even after his earlier complaint to Gouveia, Squeo "continued to harass me". Squeo, however, was not told who had made the earlier complaints and therefore he did not know that Serrano had done so. Nonetheless, it is the case that Serrano claims (although this is denied by Squeo) that Squeo continued to ask him if he was interested in joining a union after he told Squeo that he was not interested in doing so. This level of repeated questioning may be ineffectual, but it is not harassment.

39. Of far greater concern is the fact that Serrano declares that on one occasion, Squeo and another union supporter cornered him with forklifts that they were driving and intimidated him. Gouveia declares that Serrano raised this complaint with him prior to the November 23, 2010 meeting. Such behaviour, if it occurred could have been intimidating. In any event it is clearly a health and safety risk. I note that Squeo denied he engaged in this conduct.

40. In the termination letter, however, there is no reference to the fact that Squeo and the other worker had cornered and intimidated Serrano with forklifts. Further, during the

consultation, Gouveia stated that fact didn't cross his mind in making the decision to terminate Squeo.

41. Having regard to all of the material before me, and in particular the events described above, I draw the following conclusions.

42. There is no dispute that Sobeys was aware that Squeo was soliciting support on behalf of the union. It appears that Squeo was doing so during working hours. Squeo was given a verbal warning for doing so. Thereafter Sobeys assigned Squeo to work in the Repack Area. It appears that this was done in order to ensure that Squeo would have minimal contact with other employees during working time. It also appears that Squeo's activities during this assignment were subject to extra scrutiny by one of Sobeys' Team Leaders. It appears that this was done because of Squeo's activities as a union organizer. It appears, however, that Squeo continued to solicit support on behalf of the union during working time. Squeo was then terminated for continuing to do so.

43. Although Sobeys maintains that the fact that the subject matter of the solicitation was unionization was irrelevant to its decisions, based on the material before me this does not appear to me to be the case. There is no question that an employer policy prohibiting solicitation is presumptively valid in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly: see *The Adams Mine*, [1982] OLRB Rep. Dec. 1767, 1982 CanLII 978 (ON L.R.B.) at paragraph 22. However, in this case it does not appear that Sobeys has a no-solicitation policy upon which it can rely. It appears that any such policy is not in writing. The scope of the policy is unclear. The consequences, if any, prescribed for a breach of any such policy are unknown. There is nothing in the materials to suggest that any such policy has been made known to employees let alone ever been applied with respect to solicitation which is not in relation to a union or with similar effect. Given the tolerance shown by Sobeys for other discussions during working time, it appears unlikely to me that Squeo's employment would have been terminated had he been soliciting in relation to any other cause. It appears therefore that Squeo's employment was terminated not simply because he was soliciting during working hours, but at least in part because he was a known and active organizer on behalf of the union.

44. In the result I am not satisfied that the termination of Squeo's employment by Sobeys appears unrelated to the exercise of rights under the Act. Accordingly, the precondition established by section 98(3) with respect to an interim order has been satisfied.

**The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway: s. 98(2) 1.**

45. This condition requires the Board to "determine as a question of fact, whether the circumstances giving rise to the unfair labour practice complaint in the main pending application arose during a campaign to establish bargaining rights": *Patrolman* at paragraph 49.

46. In its written submissions, Sobeys took the position that this condition was not satisfied. It did not pursue this position in oral argument.

47. The pending unfair labour practice complaint arises from the union's attempt to obtain sufficient membership cards to enable it to apply for certification. I have no hesitation in finding that this constitutes a campaign to establish bargaining rights.

**There is a serious issue to be decided in the pending proceeding: s. 98(2)2.**

48. This condition requires the Board to "review the pleadings of both parties to determine whether there is a serious issue between them to adjudicate in the main application": *Patrolman* at paragraph 50.

49. Sobeys acknowledges that the underlying unfair labour practice complaint involves the alleged termination of an inside organizer and that the Board has consistently found that this is a serious issue. I so find in this case.

**The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives: s. 98(2)3.; and**

**The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding: s. 98(2)4.**

50. These two conditions:

> … both require the Board to draw conclusions as to the likely prospective consequences to the parties where the relief sought is or is not granted. Both sections require the Board to attempt to anticipate the degree of harm or the labour relations consequences which will occur, as a result of the granting or withholding of relief. Both require the Board to examine the current circumstances of the parties and to then extrapolate to predict likely future outcomes.
>
> (*Patrolman* at paragraph 51.)

51. In *K2 Electrical*, at paragraph 30, the Board described the manner in which these determinations were to be made as follows:

> In my view, for the purposes of the interim application, the determination of each party's circumstances is to be made primarily on the declarations filed by that party, as supplemented through information obtained by the Board at the consultation, and through the application of the Board's experience, in particular with respect to the prediction as to likely future outcomes. This appears to me to be the nature of the exercise which the Board undertook in *Patrolman*.

52. Sobeys argues that the union will not have suffered irreparable harm because the termination of Squeo's employment was unrelated to his union activity, but rather related to his improper solicitation activities. With respect, this argument appears to mistake the question under section 98(3) for the question under section 98(2)3. In any event, for the reasons stated above, it appears to me that Squeo's employment was terminated at least in part because of his union activity.

53. Squeo was an active, visible supporter of the union. He appears to have been terminated for soliciting support for the union, albeit during working hours. While he was an employee, the union succeeded in signing up approximately 30% of the employees in its intended bargaining unit. Magee's declaration indicates that since Squeo's termination he has received no further signed membership cards and the other inside organizers have informed him that they refuse to continue the organizing campaign because the other employees refuse to discuss unions with them and the inside organizers fear termination.

54. Sobeys argues that it was Squeo's presence in the workplace which created fear amongst the employees, referring to the statements by its declarants that they felt "bothered" or "intimidated" by Squeo. I have addressed those arguments above. In short, while those individuals may not have liked being asked if they would support the trade union, there would appear to be no basis on which the conduct described (with the possible exception of the alleged incident with the forklift to which I return below) can be objectively described as intimidation or harassment. In any event, the harm to the union relates not to the impact of Squeo's presence on opponents to the union, but the impact of his absence on its potential supporters.

55. In the result, I conclude that the union will experience irreparable harm to its organizing campaign if interim relief is not granted.

56. The remaining issue is that of the balance of harm. Sobeys argues that it would suffer significant harm if Squeo were reinstated on an interim basis. It argues that Squeo has shown a persistent pattern of insubordination, both in continuing to solicit his co-workers during working hours after being disciplined for having done so in the first place and in his conduct during the investigation meetings. The difficulty with this argument is that, for the reasons stated above, it does not appear to me that Squeo was terminated for this insubordination.

57. Sobeys also points to Squeo's alleged unsafe use of a fork lift to intimidate Serrano. It argues that neither it nor its employees should be required to accept the safety risks that would accompany the reinstatement of this employee. The difficulty with this argument is that Sobeys apparently did not consider it to be of sufficient severity in the past to justify discipline.

58. Sobeys cites *Sarnia Paving Stone*, 2005 Can LII 35997 (ON L.R.B.) and *Ontario Lottery and Gaming Corporation*, 2006 Can LII 6044 (ON L.R.B.) for the proposition that the balance of harm will favour the employer when the employee whose reinstatement is sought has been discharged for insubordination and it does not appear that the employee will follow instructions if reinstated.

59. An employer is entitled to adopt and enforce a non-solicitation policy, provided that it was not adopted for a discriminatory purpose or applied unfairly. Further, an employee who breaches such a policy may be subject to discipline for insubordination. Depending on the nature of the breach, including any past breaches, and the employer's policies and past practices, such insubordination by an employee may result in termination of employment. Provided that there is no anti-union animus, discipline, including termination, of such an employee for soliciting support for the union will not be in breach of the Act. Further, if the employee has been openly and repeatedly defiant of the employer's policy, the balance of harm may not favour reinstatement of the employee in the case of termination. Similarly, an employer can terminate a key union organizer who engages in unsafe or dangerous acts, whether in the course of soliciting union

support or not, and the balance of harm may not favour the reinstatement of the employee. That, however, is not this case. *Sarnia Paving Stone* and *Ontario and Gaming Corporation* are factually distinguishable.

60. Accordingly, I find that the balance of harm favours the granting of interim reinstatement relief sought.

**Disposition**

61. The Board orders Sobeys Vaughan Retail Support Centre and / or Sobeys Inc. to:

a) reinstate Corrado Squeo immediately to his employment on the same terms and conditions he enjoyed prior to November 23, 2010;

b) refrain from suspending, discontinuing or otherwise terminating, Corrado Squeo's employment or changing the terms and conditions of his employment until the Board issues final decisions in the unfair labour practice complaint (Board File No. 1950-10-U) except with the consent of the Union or of the Board, on application by the Sobeys Inc.;

c) post a copy of this decision in conspicuous locations where its employees are likely to see it;

d) keep these copies of this decision posted for not less than 30 days; and

e) post a copy of the attached Notice to Employees in conspicuous locations where its employees are likely to see it and keep it posted for 30 days.

62. I remain seized to deal with any issues arising out of the implementation of this decision.

## Appendix "A"

# The Labour Relations Act, 1995

### NOTICE TO EMPLOYEES

## Posted by order of the Ontario Labour Relations Board

We have posted this notice in compliance with a direction of the Board, issued after a hearing in which both the company and the union had the opportunity to make submissions.

The Board has ordered Sobeys Inc. to reinstate Corrado Squeo ON AN INTERIM BASIS until the Board considers the reason for his discharge. A hearing before the Board will commence soon. The purpose of that hearing is to determine why Corrado Squeo was discharged.

If the Board ultimately determines that Corrado Squeo was discharged for improper conduct, and his support for the Union had nothing to do with it, the temporary reinstatement order will be revoked, and the Company will no longer be required to employ him.

If the Board ultimately finds that his discharge occurred because he was a union supporter, exercising his rights under the *Labour Relations Act,* the Board may confirm his reinstatement, and direct that he be compensated for all earnings and benefits lost as a result of his discharge.

Employees in Ontario have these rights which are protected by law:

> An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.
>
> An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.
>
> An employee has the right to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.
>
> An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act, 1995*, as amended.
>
> An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.

> An employee has the right to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.

It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filled with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 30 consecutive days.**

**DATED this 17th day of December, 2010.**

**0674-05-R** Universal Workers Union, Labourers International Union of North America, Local 183, Applicant v. Ian Somerville Construction Limited, Somerville Construction Management Ltd., 671860 Ontario Inc. c.o.b. as **Somerville Construction**, Robert Ian Somerville sole proprietorship, c.o.b. as **Somerville Construction**, Ian Somerville, sole proprietorship, c.o.b. as **Somerville Construction**, Responding Parties v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Intervenor

**Abandonment – Bargaining Rights – Construction Industry – Delay – Related Employer – Sale of Business – The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed**

**BEFORE**: *Harry Freedman*, Vice-Chair.

**APPEARANCES:** *Graham Williamson, Jack Oliviera* and *Pat Sheridan* for the applicant; *John-Paul Alexandrowicz, David Ross* and *Ian Somerville* for the responding parties; *J. David Watson* and *André Arsenault* for the intervenor.

**DECISION OF THE BOARD**; December 13, 2010

1. This is an application for declaratory and other relief under sections 1(4) and 69 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 as am. (the "Act") in which the applicant seeks a declaration that it holds bargaining rights for the employees of the responding parties outside the industrial, commercial and institutional sector of the construction industry and that the responding parties are bound by collective agreements with the applicant. The Board by decision dated March 5, 2009 based on the agreement of the parties dismissed this application in respect of all the responding parties except Ian Somerville Construction Limited ("ISCL") and 671860 Ontario Inc. c.o.b. as Somerville Construction ("Somerville Construction").

2. There is no dispute the applicant held bargaining rights in respect of construction labourers who had been employed by ISCL outside the industrial, commercial and institutional sector of the construction industry. The applicant claims Somerville Construction ought to be

subject to those bargaining rights and seeks a declaration to that effect under sections 1(4) and 69 of the Act.

3. Somerville Construction does not suggest it and ISCL were not related businesses under common control and direction. Rather, it asserts the applicant had abandoned those bargaining rights and, in any event, as a matter of discretion under section 1(4) of the Act, the Board ought not to issue the declaration the applicant seeks.

4. There was nothing in the material filed or in the evidence presented in this matter on which the Board could find that a sale of a business within the meaning of section 69 of the Act had occurred between ISCL and Somerville Construction. The application, insofar as it seeks relief under section 69 of the Act, on that basis must be dismissed. Therefore, in order for the applicant to obtain the remedies it seeks, the Board must exercise the discretion conferred on it by section 1(4) of the Act in favour of the applicant.

5. Although Somerville Construction initially asserted the applicant had abandoned any bargaining rights it had had, whether with ISCL or Somerville Construction, in its final argument it quite properly did not pursue the argument there was an actual abandonment of the bargaining rights as that principle has been applied by the Board. See, for example, *J.S. Mechanical*, [1979] OLRB Rep. Feb. 110; *Hugh Murray Limited*, [1979] OLRB Rep. July 664; judicial review dismissed (1980), 33 O.R. (2d) 670. ISCL had ceased carrying on business within about a year of the applicant obtaining bargaining rights and never carried on business again. In that circumstance, there would simply be no basis for concluding the applicant had abandoned the bargaining rights it had obtained in respect of ISCL.

6. The applicant had never held bargaining rights in respect of Somerville Construction as no sale of a business had occurred between Somerville Construction and ISCL. Somerville Construction recognized the applicant could not abandon bargaining rights it had never held. Somerville Construction nevertheless submitted the principles the Board has applied when determining whether a trade union has abandoned its bargaining rights ought to inform the Board's exercise of discretion.

7. Somerville Construction does not assert mere delay as the basis for asking the Board to refuse to grant the discretionary declaration the applicant seeks. Rather Somerville Construction contends that the extraordinary delay taken together with the fact that it has maintained a stable workforce, most of whom have been represented by the intervenor since October 1988 and the applicant's inaction in the face of Somerville Construction openly carrying on work coming within the scope of the applicant's collective agreements for some 17 years before the applicant sought to assert bargaining rights ought to cause the Board to refuse to grant the discretionary relief the applicant seeks.

8. Thus, the issue in this case is whether the Board should exercise its discretion under section 1(4) of the Act and declare the applicant holds bargaining rights for the construction labourers employed by Somerville Construction and that it is bound by one or more collective agreements with the applicant in respect of the work done by construction labourers outside the industrial, commercial and institutional sector of the construction industry in Board Area 8, Simcoe County and perhaps elsewhere in the province.

9. The source of the applicant's bargaining rights is a voluntary recognition agreement entered into by ISCL on July 23, 1981 (the "Memorandum of Agreement") in which ISCL recognized the applicant as "the exclusive bargaining agent for all construction labourers" employed by ISCL "in all sectors of the construction industry excluding the industrial, commercial and institutional sector" in Board Area 8 and the County of Simcoe. The Memorandum of Agreement provided the parties to that agreement agreed they were bound by "all the terms, conditions, provisions, appendices and schedules (including both monetary and non-monetary items)" of the 10 collective agreements listed in paragraph 2 of the Memorandum of Agreement that the applicant had entered into with a number of employers' associations. On that same date ISCL also entered into a collective agreement in which it recognized both the applicant and the International Union of Operating Engineers, Local 793 ("Local 793") as the bargaining agent for "all employees" of ISCL "employed in its landscaping division" in Board Area 8 (the "Landscaping Agreement"). The applicant and ISCL executed both the Memorandum of Agreement and the Landscaping Agreement. Local 793 was not a signatory to the Landscaping Agreement.

10. Both the Memorandum of Agreement and the Landscaping Agreement provided they became effective August 1, 1981.

11. The Memorandum of Agreement provided it was to remain in effect until August 1, 1982 and was to continue from year to year thereafter unless notice was given of a proposed revision or termination. The Memorandum of Agreement also provided the parties agreed to be bound by any renewals to the ten collective agreements listed in paragraph 2 of that agreement. The Landscaping Agreement provided it was to remain in effect until April 30, 1982 and was to continue from year to year unless notice was given of a proposed revision or termination.

12. ISCL applied one or more of the collective agreements by which it and the applicant were bound for a relatively brief period of time after August 1, 1981. Ian Somerville, the principal of both ISCL and Somerville Construction testified remittances had been made to the applicant on behalf of several construction labourers ISCL employed between August and December 1981.

13. In or about November 1981, it appears ISCL entered into a voluntary recognition agreement with Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America for a bargaining unit of carpenters and carpenters' apprentices employed in the industrial, commercial and institutional sector of the construction industry in the province of Ontario. ISCL employed carpenters pursuant to the Carpenters' provincial agreement and made remittances to the intervenor in respect of the carpenters it employed.

14. Mr. Somerville in cross examination agreed ISCL operated under collective agreements with both the applicant and the intervenor between November 1981 and the spring of 1982 when it ceased carrying on business.

15. ISCL became insolvent, its business was wound up, its employees were laid off and its assets were disposed of in 1982.

16. Somerville Construction was incorporated in 1986 and began to carry on business in the construction industry in the fall of 1987. Shortly thereafter, the intervenor applied for declaratory and other relief under sections 1(4) and what was then section 63, now section 69, of

the Act (Board File No. 0330-88-R). The Board in a decision issued in October 1988 (reported at [1988] OLRB Rep. Oct. 1022) declared ISCL and Somerville Construction are one employer for purposes of the Act and as a result declared that Somerville Construction was bound by the intervenor's provincial collective agreement. The Board in that decision also explicitly dismissed the application in respect of section 63 [now 69] of the Act.

17. Since the fall of 1987, Somerville Construction has been active and continuously engaged in construction work as a speciality landscaping contractor principally in Board Area 8 in the industrial, commercial and institutional sector and other sectors of the construction industry on a large number of high profile projects involving work on public spaces such as Harbourfront, Dundas Square and Ontario Place.

18. The issue with respect to the applicant's bargaining rights arose as a result of a grievance filed by the applicant in February 2005 with respect to a project Somerville Construction was engaged in at Harbourfront. The applicant claimed the work Somerville Construction was performing came within the Landscaping Agreement. Somerville Construction denied the grievance and asserted the applicant did not hold bargaining rights for its employees. One element of the merits of the grievance related to whether the Harbourfront project was in the industrial, commercial and institutional sector or another sector of the construction industry.

19. Somerville Construction keeps about 13 or 14 skilled carpenters employed year round. Those carpenters are members of the intervenor. Since being declared bound by the Carpenters' provincial agreement it has applied that collective agreement to all work done by its carpenters without regard to what sector of the construction industry a particular project may be within. Somerville Construction has also employed about four or five construction labourers on its projects. It considers those construction labourers "non-union" employees and therefore does not abide by any collective agreement in respect of their work.

20. Mr. Somerville explained both the construction labourers, who work with the carpenters and may from time to time operate some machinery or equipment, and the carpenters are assigned to perform the work that needs to be done without regard to sector or the trade jurisdiction of the intervenor. He testified that some 75% to 80% of the construction work carried out by Somerville Construction was public space site work with the balance of the work usually involving office renovations or tenant "fit up" work. Up to the point the applicant filed its grievance, Somerville Construction did not consider the sector of the construction industry a particular project might come within to be a material consideration in determining how its work would be done or who would do that work.

21. As far as Somerville Construction was concerned, all of its employees carried out the work that had to be done on its projects. It applied the Carpenters' collective agreement to the carpenters it employed and treated its construction labourers as employees who were not subject to any collective agreement. Mr. Somerville testified the carpenters employed by Somerville Construction included three divers who did a good deal of diving or "wet work", particularly on the Harbourfront projects it has had over the years. He also explained the carpenters are not limited to doing "carpentry" work. They do the work that has to be done, including picking up a shovel, tying rebar or welding. It appeared to me from the evidence that Somerville Construction assigned its carpenters to carry out the work that required precision and the skills of trained carpenters and assigned its construction labourers to perform other work but, depending on what

work needed to be done, would also assign carpenters to do the work often done by construction labourers in order to keep the carpenters fully employed.

22. The Board received detailed evidence about the work Somerville Construction had carried out from late 1987 up to the date of the hearings. There were approximately 146 projects for which Somerville Construction was responsible during that period. Those 146 projects were listed on a schedule prepared by Somerville Construction the parties used during the testimony of Mr. Somerville, the only witness who gave oral evidence in this proceeding, and during argument. The applicant's grievance was filed in respect of job no. 135 on that list—Harbourfront Stage 2 relating to the construction of a boardwalk at the water's edge. The applicant asserted that the Board should have no regard to any project where work was done after it had filed its grievance, which would have me disregard 11 projects undertaken after the grievance was filed.

23. There was some dispute between the parties as to whether some of the projects listed on the schedule were material to the issue inasmuch as Somerville Construction had subcontracted the work covered by the applicant's collective agreements to contractors that were bound by a collective agreement with the applicant. In addition, there were many other projects listed by Somerville Construction about which the applicant claimed it had no knowledge. Since it was unaware of a number of projects and there were several others where all the relevant work was subcontracted by Somerville Construction to contractors bound by collective agreements with the applicant those projects, according to the applicant, should be disregarded in assessing whether to grant the relief the applicant seeks.

24. There is no need, in my view, to consider whether some of the projects about which the applicant claims it had no knowledge ought to have come to its attention nor do I have to consider the projects where subcontractors bound by collective agreements with the applicant did all the relevant work on those projects. The applicant does acknowledge that between 1987 and 2005, there were 11 Somerville Construction projects where the applicant's members were employed by subcontractors to do some work at those projects but where other work coming within the scope of the applicant's collective agreement was carried out by persons who were not members of the applicant and no action was taken by the applicant in respect of those 11 projects. Moreover, the applicant acknowledged there were during that same period of time 36 other projects where Somerville Construction performed work coming within the scope of the applicant's collective agreements, either directly or through subcontractors, that was carried out by persons who were not members of the applicant. In other words, accepting the applicant's position about which of the 146 projects carried out by Somerville Construction from the time it began carrying on business the Board should disregard when determining how to exercise its discretion in this case, it is acknowledged by the applicant that over a period of some 17 years up to the date of the grievance in respect of job no. 135, Somerville Construction performed work coming within the scope of the applicant's collective agreements using its own employees or subcontractors not bound by a collective agreement with the applicant, on some 47 construction projects where the applicant knew or ought to have known such work was being done but did nothing to pursue the bargaining rights it had obtained through ISCL.

25. The applicant called no evidence to explain why it did nothing in respect of the construction projects about which it knew or ought to have known work was being done by Somerville Construction, directly or indirectly, contrary to the collective agreements by which it now claims Somerville Construction is bound. The applicant candidly conceded it was not able to

provide any reason for its failure to assert its bargaining rights in relation to those 47 construction projects.

26. The applicant submitted that its failure to assert bargaining rights over that period of time should not preclude the Board from exercising its discretion to declare Somerville is subject to the bargaining rights the applicant held with ISCL. It argues there can be no issue about an actual abandonment of bargaining rights since ISCL ceased carrying on business shortly after it voluntarily recognized the applicant and because the applicant never held bargaining rights for Somerville Construction, there was nothing for it to abandon. I agree.

27. In order for the Board to decline to exercise discretion under section 1(4) of the Act the applicant submits it is incumbent upon the employer to demonstrate it would be prejudiced by the declaration. In this case there can be no prejudice, the applicant asserts, since the intervenor does not hold bargaining rights outside the industrial, commercial and institutional sector. The applicant contends the essence of Somerville Construction's argument is that it would be prejudiced because it would be bound by a collective agreement with the applicant. But, according to the applicant, being bound by a collective agreement is not the kind of prejudice that is material to the Board's exercise of discretion, nor is suggesting that the employer might suffer some commercial prejudice as a result of the Board issuing the declaration the applicant seeks. The Board in *KNK Limited*, [1991] OLRB Rep. Feb. 209 observed at page 222:

> In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief" which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past.

The applicant submits Somerville Construction must demonstrate some real labour relations prejudice that would cause the Board to refuse to make the declaration the applicant seeks. Having Somerville Construction bound by the applicant's collective agreements outside the industrial, commercial and institutional sector when it already had a collective bargaining relationship with the intervenor might give rise to jurisdictional and sector disputes and perhaps have an impact on how it assigns work to its employees, but those factors are not material, the applicant submits. The applicant argues that in essence, Somerville Construction is asserting prejudice because it would become bound by the applicant's collective agreement and the consequences that result from being so bound. The applicant emphasizes it is not seeking to disturb the intervenor's bargaining rights that encompass only the industrial, commercial and institutional sector.

28. The fact the applicant has delayed in seeking a declaration does not, it argues, warrant the Board refusing to exercise its discretion under section 1(4) of the Act. The applicant relies on several Board decisions including *KNK Limited*, *supra*, *Tri-County Contracting*, [1991] OLRB Rep. Dec. 1416 and *Murard Masonry Contractors Ltd.*, [2005] OLRB Rep. July/August 662 in which the Board wrote at page 674, in succinctly summarizing the principle established by *KNK Limited*:

> As the Board stated in *KNK*, delay alone will not deprive the applicants of their right to the declaration although it might deprive them of retroactive application of those rights.

29. The applicant submits the situation faced by Somerville Construction is no different than the situation faced by any employer when a construction craft union seeks certification for an employer's unrepresented employees when another construction craft union holds bargaining rights for some of that employer's other employees. In this case, as the applicant points out, the intervenor's bargaining rights are limited to the industrial, commercial and institutional sector of the construction industry. The bargaining rights the applicant claims are outside that sector. The applicant argues that issuing the declaration it seeks cannot conflict with the intervenor's bargaining rights and therefore ought not to preclude the Board from declaring the applicant holds bargaining rights for the construction labourers employed by Somerville Construction outside the industrial, commercial and institutional sector of the construction industry. The applicant cites *Titan Contracting (Windsor) Inc.*, [2007] OLRB Rep. Nov./Dec. 1140.

30. There is no doubt the applicant would have been successful if it had applied for relief under section 1(4) of the Act for a declaration it held bargaining rights for Somerville Construction at about the same time or shortly after the intervenor had applied successfully for a single employer declaration and a declaration that Somerville Construction was bound by the Carpenters' provincial collective agreement. In other words, no issue of abandonment or serious argument about delay could have been raised. Moreover, the fact that Somerville Construction would become subject to both the applicant's bargaining rights and the intervenor's bargaining rights would not have militated against the Board making the declaration since that was the situation ISCL had voluntarily entered into shortly before it ceased carrying on business.

31. The applicant must have been aware of the existence of Somerville Construction performing work coming within the scope of its collective agreement for some 17 years before asserting it held bargaining rights for the construction labourers employed by Somerville Construction. The principles set out in *KNK Limited, supra*, and the subsequent cases that have adopted those principles all make clear that delay in seeking to assert bargaining rights against a related employer, in and of itself, is not a proper basis for refusing to exercise discretion under section 1(4) of the Act. Having said that, the Board in those cases also makes clear that delay in making an application and the reasons for that delay are relevant considerations.

32. In *KNK Limited, supra*, the Board wrote later at page 220:

> A union's undue delay in the face of knowledge of the corporate relationship (i.e. what section 1(5) suggests a union will *not* know) may be a factor to be considered in exercising the Board's discretion, but the focus should be on the actual prejudice suffered by the employer and the extent to which the union's inaction actually contributed to that prejudice. Where the union's *inaction is so longstanding as to be tantamount to an abandonment of its bargaining rights*, the Board may well dismiss the application. [emphasis in last sentence added]

Mr. Somerville was the principal of ISCL. Somerville Construction carried on business openly on a number of high profile projects in Board Area 8. Mr. Somerville was actively involved in the work undertaken by Somerville Construction. This is not a case of Mr. Somerville trying to hide behind a new company that was created to appear unrelated to ISCL. Rather, as is apparent from the speed with which the intervenor moved to assert the bargaining rights it had previously held with ISCL against Somerville Construction, the connection between ISCL and Somerville Construction was, in my view, readily apparent to any trade union that might have had an interest in the construction work Mr. Somerville was performing through Somerville Construction.

33. The Board in *Tri-County Contracting*, *supra* emphasized that mere delay was insufficient to cause the Board to refuse to exercise its discretion under section 1(4) of the Act and focussed on whether issuing the declaration after a lengthy delay in seeking that relief would prejudice the employer. The Board at page 1419 made the following comments in respect of that issue, relying on the principles established in *KNK Limited*:

> ... a trade union which has established that the basis for a section 1(4) declaration exists (that is, that two or more entities carry on associated or related activities or businesses with a common control or direction), and the mischief which section 1(4) is designed to prevent or remedy exists, is generally entitled to a declaration in that respect unless there are compelling labour relations policy reasons to not do so, or where such a declaration would unfairly prejudice the respondents. In that latter respect, there must be demonstrable prejudice which must be something more than becoming subject to the very bargaining rights which section 1(4) is designed to protect. *A union's undue delay in the face of actual knowledge of the material facts may be a factor which the Board will consider,* although the presumption in such an application is that a trade union will not know (which is the reason section 1(5) is in the Act). However, the Board will focus on the actual prejudice suffered by the employer entities *and the contribution of the union's conduct to that prejudice.* Consequently, in the absence of a clear representation by the trade union that it would not assert its bargaining rights with respect to one or more of the employer entities concerned, or a situation in which the trade union has participated in the very corporate or business structuring which is the subject of its section 1(4) application, any "delay" by a trade union will normally be factored in when the Board considers what retrospective relief, if any, is to be given a declaration or what other relief, if any, should be granted. [emphasis added]

34. The Board in *Quinte Drywall Ltd.*, decision dated November 13, 2009, unreported, Board File Nos. 1779-08-R and 2928-08-R, 2009 CanLII 64463 dealt with a preliminary motion to dismiss the two applications for a single employer declaration on the ground of delay. The motion proceeded on an agreed statement of fact. The Board, in dismissing the motion, made the following observations:

> 27. This motion is about whether the Board would decline to exercise its discretion to make a single employer declaration by reason of delay. As each case of this type is determined on its own particular facts, I am not prepared to make the determination as to how I would exercise my discretion in the absence of the facts relevant to that determination.
>
> 28. Under the agreed facts, Quinte is the leading commercial residential drywall company in a region of approximately 180,000 people. Its operations were "sufficiently open and conspicuous to have come to the applicant's attention" for 8 years prior to the application being filed. I am not persuaded

> that I can make the conclusions necessary in this case without *the benefit of evidence as to the manner in which the company operated and the unions conducted themselves during the period since 2000.*
>
> 29. This decision is not to be construed as a determination that the Board would not consider the same arguments made by the responding party at a later time in the proceeding, with the benefit of evidence and facts relevant to the exercise of discretion under section 1(4) of the Act. It is only a determination that I am not prepared to make this conclusion as to the manner of the exercise of discretion on a *prima facie* basis. Consequently, the responding party's motion to dismiss is denied.

In *Quinte Drywall Ltd.* the employer resisting the application had operated for eight years in a manner in which it ought to have come to the unions' attention. The Board in that decision made it clear that the manner in which the employer operated and how the unions conducted themselves were relevant considerations in the exercise of the Board's discretion.

35. The applicant contends the only prejudice Somerville Construction can point to is being bound by the applicant's collective agreement. The Board in *E.S. Fox Limited*, [1991] OLRB Rep. July 819 discussed the notion of prejudice and delay at page 830:

> …the only potential prejudice to Fox and Spencer flowing from a one employer declaration which might be attributed to the union's inaction is the prejudice of having to apply a term of the Agreement which, together, they have circumvented for the past three years and the consequent risk of damages…. The prejudice to the union, on the other hand, if the Board does not declare Fox and Spencer to be treated as constituting one employer, would be the risk that Fox might use Spencer again to avoid any of its obligations under the Agreement. That is the type of mischief which subsection 1(4) of the Act was designed to prevent. Where, as here, actual mischief already has been demonstrated, the potential prejudice to the union outweighs the potential prejudice to Fox and Spencer of having to comply with the Agreement, and so end the mischief, and of being at risk of damages because of the mischief which they created. There is no compelling policy reason for not making a one employer declaration. *Nor can it be said that the union's inaction respecting the breach of the Agreement amounts to abandonment of its bargaining rights such that the Board ought to dismiss the application.* [emphasis added]

Although any damages the applicant might claim against Somerville Construction if the Board granted a single employer declaration would be addressed by ensuring the declaration operated prospectively, in my view, the prejudice Somerville Construction faces arising from the applicant's delay involves more than a claim for damages.

36. Somerville Construction has since commencing business and, more importantly following the successful application by the intervenor, assigned the work it performs without regard to the sector or sectors in which its projects might come and, perhaps more importantly, assigned work to its employees based on whether its employees had the skills to do the required work rather than based on whether the work was "carpenters' work" or "labourers' work". I note in that regard that there is a great deal of overlap between the trade or work jurisdictions of the applicant and intervenor.

37. Somerville Construction has for more than 17 years carried on business in the construction industry doing landscaping work on a number of high profile projects where members of the applicant also did work from time to time but where work coming within the scope of the applicant's collective agreements was performed by or on behalf of Somerville Construction by persons who were not its members without complaint by the applicant. The applicant acknowledged it knew or ought to have known about a number of the projects for which Somerville Construction was responsible and where work coming within the scope of its collective agreement was performed by persons who were not its members. It was unable to provide an explanation for not taking any steps for some 17 years to attempt to assert the bargaining rights it had obtained from ISCL to Somerville Construction.

38. Somerville Construction employed and continues to employ construction labourers and carpenters. It treats its construction labourers as being non-union employees and applies the intervenor's collective agreement to all work done by the carpenters it employs regardless of what sector of the construction industry they are working in.

39. If the applicant sought certification in respect of the construction labourers employed by Somerville Construction any arguments Somerville Construction or the intervenor might have about disrupting a long standing pattern of assigning work or the potential for sector and jurisdictional disputes that might arise if the applicant was successful in obtaining bargaining rights would have no bearing on the ultimate disposition of such an application because the Board does not have the discretion to refuse to certify a trade union that meets the conditions established by the Act for certification. See *Ontario Power Generation*, [2005] OLRB Rep. May/June 464 at 467. In other words, even where the work jurisdictions of two trade unions overlap, bargaining rights do not. (See *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305 at 1336.) While the bargaining rights of the applicant if applied to Somerville Construction would not conflict with the bargaining rights held by the intervenor, given the manner in which Somerville Construction assigns work to its employees there is no doubt there would be overlapping work jurisdictions. Moreover, because the intervenor's bargaining rights are limited to the industrial, commercial and institutional sector and the bargaining rights the applicant relies on encompass all sectors other than the industrial, commercial and institutional sector it is likely, if not certain, that sector disputes would arise in relation to the work Somerville Construction carries out if the applicant's bargaining rights attached to Somerville Construction.

40. The declaration the applicant seeks under section 1(4) of the Act is discretionary. An application for certification is not. The Board has indicated that in exercising its discretion under section 1(4) of the Act it does take delay into account in terms of labour relations prejudice and whether the delay occasioned by a trade union seeking relief is tantamount to an abandonment of bargaining rights.

41. It appears to me that waiting some 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have the bargaining rights it held for ISCL attach to Somerville Construction and not providing any explanation for that passage of time certainly gives rise to a finding that the delay is, in the words of the Board in *KNK Limited*, "tantamount to an abandonment of bargaining rights" or as the Board said in *E.S. Fox Limited*, "the union's inaction…amounts to abandonment of its bargaining rights." Simply put, the applicant's inaction in the face of so many high profile projects where work coming within the scope of the applicant's

collective agreements was performed by persons who were not its members indicates the applicant did nothing to pursue the bargaining rights it had obtained earlier from ISCL. In *J.S. Mechanical* the Board indicated it would find a union had abandoned its bargaining rights in the following circumstances:

> Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse.

The applicant's failure to act for some 17 years in these circumstances is, in my view, what the Board in *KNK Limited* and *E.S. Fox Limited* had in mind when it suggested that delay in seeking a single employer declaration may be a reason to refuse to make that declaration.

42. I am also of the view, in any event, that Somerville Construction would suffer actual prejudice if the Board granted the applicant the declaration it seeks, even if that declaration were effective as of the date it was made. Given the nature of the projects Somerville Construction undertakes and the manner in which it determines how work on its projects will be performed, whether by subcontractors or by its own employees, there is little doubt Somerville Construction would face both sector disputes and jurisdictional disputes. Because relief under section 1(4) of the Act is discretionary, I am satisfied that where there has been a significant delay in asserting the claim, where the employer has developed the methods by which it carries on its business and assigns work to its employees, some of whom are represented by another trade union, and where granting the relief sought would likely result in jurisdictional and sector dispute litigation, the Board ought to refuse to exercise its discretion to make the declaration the applicant seeks. See *Hardrock Forming Company*, [1987] July OLRB Rep. June 1003.

43. In *Sodexho MS Canada Ltd.*, decision dated February 3, 2004, unreported, Board File No. 2259-02-R, Q.L. cite [2004] OLRD No. 331 the Board commented, after referring to *Industrial Mine Installations Ltd.*, [1971] OLRB Rep. Nov. 712 and the *Hardrock Forming Company* decision that it "would not create a conflict by granting a related employer declaration in the face of another union with existing bargaining rights." I recognize that both *Industrial Mine Installations Ltd.* and *Hardrock Forming Company* were referring to conflicting bargaining rights but it seems to me the principle underlying those decisions is that the Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction. That principle, in my view, is particularly significant where there has been extraordinary delay in seeking that relief.

44. That same approach was considered by the Board in *Titan Contracting (Windsor) Inc.*, *supra* in which the Board observed at 1146-47:

> Further, as asserted by Carpenters 494, the cases relied upon by LIUNA 625 appear to involve situations where there was either a complete or substantial overlap in the bargaining rights and/or the conflicting bargaining rights would give rise to an immediate jurisdictional dispute. Obviously, in these situations there is no practical way for the Board to issue a declaration under subsection 1(4) of the Act without revoking bargaining rights or setting the stage for jurisdictional disputes.

The Board in that case was concerned whether the declaration being sought under section 1(4) of the Act would be "setting the stage for jurisdictional disputes". (Even in situations where there is no overlap of bargaining rights, jurisdictional disputes could still exist especially where a sector issue underlies conflicting claims for the assignment of work.) The Board in dismissing a preliminary motion to dismiss the application noted it could fashion an appropriate remedy by excluding certain work from the bargaining rights it could declare binding on the employer.

45. Having regard to the amount of time that elapsed before the applicant sought to claim it held bargaining rights in respect of Somerville Construction, its inability to provide any explanation for allowing that much time to pass by when Somerville Construction was working on a number of public projects using persons who were not members of the applicant to carry out work coming within the scope of the applicant's collective agreements when it knew or ought to have known about such work, and the labour relations prejudice that would result in light of the intervenor holding bargaining rights for Somerville Construction's carpenters working in the industrial, commercial and institutional sector if the Board granted the declaration the applicant seeks, the Board is not prepared to exercise its discretion under section 1(4) of the Act and declare the applicant holds bargaining rights for the construction labourers employed by Somerville Construction.

46. This application for declaratory relief under section 1(4) of the Act is dismissed.

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**1480-08-R; 1663-08-U; 1830-08-U** Canadian National Federation of Independent Unions, Applicant v. **Superior Boiler Works & Welding Ltd.**, Responding Party v. Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67, and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787, Intervenors; Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67, Applicants v. Superior Boiler Works and Welding Limited, Canadian National Federation of Independent Unions, Responding Parties; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787, Applicant v. Superior Boiler Works and Welding Limited and Canadian National Federation of Independent Unions, Responding Parties

**Certification – Employer Support – Unfair Labour Practice – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the**

**CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue**

**BEFORE:** *Lee Shouldice*, Vice-Chair.

**APPEARANCES:** *Georgina Watts* and *Joe Daignault* for the Canadian National Federation of Independent Unions; *J. James Nyman, Mark Ellerker* and *Andrew Tarr* for the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787; *Rick Simmons* and *David DeFaveri* for Superior Boiler Works and Welding Limited.

**DECISION OF THE BOARD**: November 25, 2010

**Introduction**

1. Board File No. 1480-08-R is an application for certification brought by the Canadian National Federation of Independent Unions (the "CNFIU") to represent an all employee bargaining unit of the responding party ("Superior Boiler" or "the employer") working in or out of the employer's operation in Hamilton, Ontario. The application for certification was filed with the Board on August 12, 2008. Board Files No. 1663-08-U and 1830-08-U are unfair labour practice complaints filed with the Board that allege violations of sections 15, 70, 72 and 76 of the Act. Various other proceedings have been adjourned pending a decision in Board File No. 1480-08-R.

2. These three proceedings were heard together pursuant to a decision of the Board dated November 5, 2008. I heard the evidence of six witnesses and the argument of counsel over the course of a number of hearing days. As a general observation, I found Messrs. Ellerker and Weatherson, on behalf of the OPTC, and Mr. Daignault and Ms. Waller, on behalf of the CNFIU, to be credible witnesses. Each gave his or her testimony in a frank and straightforward manner. I found the evidence given by Messrs. David DeFaveri and John Neskovic to be problematic at times. Put at its most favourable, the testimony offered by Mr. DeFaveri reflected a poor recollection of the events in dispute. At times, the testimony given by Mr. Neskovic also suffered from this weakness. I set out below my findings of fact, having regard to the evidence offered by the witnesses.

**The Facts**

3. Superior Boiler is a general electrical and mechanical contractor, and a fabricator of boiler pressure vessels. Its main facility is located in the City of Hamilton. Superior Boiler operates its business through a number of different divisions.

4. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the "OPTC") commenced an organizing drive at Superior Boiler in November, 2006. Mark Ellerker, who is currently the Business Manager of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 ("Local 67"), was at all relevant times an organizer for the OPTC and was the primary contact for the Superior Boiler organizing campaign. For all intents and purposes, the OPTC campaign was co-ordinated through Local 67. Local 67 is a chartered local of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, as is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 ("Local 787"). For the purpose of this decision, I will refer to the OPTC, Local 67 and Local 787 collectively as "the unions".

5. Early on in the organizing campaign Mr. Ellerker secured a number of membership applications. He testified that approximately 15 to 20 membership applications were secured between November, 2006 and September, 2007. As time progressed, the pace at which Mr. Ellerker secured further membership cards slowed considerably. Very few cards were signed after September, 2007, and a number of cards were lost due to employees moving on to new employment. However, as will become evident below, the organizing campaign was maintained and the continued existence of the unions' campaign was well known by Superior Boiler management and its employees.

6. In or about September, 2007, the OPTC filed an unfair labour practice complaint with the Board alleging that Superior Boiler had violated sections 70, 72 and 76 of the Act. At that same time, an application under section 50 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended, was filed by the OPTC on behalf of an individual employed at Superior Boiler. On December 18, 2007, the OPTC and Superior Boiler entered into a Memorandum of Agreement resolving both of the above-referenced proceedings. One of the terms of the Memorandum of Agreement was that prior to February 28, 2008, three senior managers of Superior - Mr. DeFaveri, the Vice-President of International Business Development, Mr. Loris Gazzola, the Vice-President of Fabrication & Manufacturing, and Mr. John Constantini, the General Manager - would meet for up to one hour at the Local 67 union hall with Mr. Ellerker and the Local 67 Business Manager. At that time the Business Manager of Local 67 was Bob Bolan.

7. This meeting occurred on February 25, 2008. Messrs. DeFaveri, Gazzola and Constantini attended on behalf of Superior Boiler. Mr. Bolan, Mr. Ellerker and Geoff Roman, a business agent of Local 67, attended on behalf of the OPTC. The tone of the meeting was formal. The OPTC hoped to build future relations with Superior Boiler by engaging in dialogue with its management and convince them that the OPTC could assist Superior Boiler in furthering its business. Mr. DeFaveri indicated at the end of the meeting that he had a lot of questions. He said that he would put those questions into an e-mail, send it to Local 67, and set up a further meeting to continue discussions. In light of that proposal, Messrs. Bolan, Ellerker and Roman indicated

that the OPTC would suspend its organizing campaign, and would not visit any of Superior Boiler's work sites or speak to any of its employees.

8. Mr. DeFaveri never sent the promised e-mail. On May 5, 2008, Mr. Bolan wrote to Mr. DeFaveri and advised him that in light of the lack of communication from Mr. DeFaveri he had instructed Local 67 organizers to continue the campaign. Mr. Bolan offered to arrange for a further meeting should Mr. DeFaveri desire one. That offer was not taken up by Mr. DeFaveri. Mr. DeFaveri testified that he does not consider Local 67 to be a good bargaining agent for Superior Boiler employees because Superior Boiler requires flexibility and desires its employees to perform the work of multiple trades. He anticipates that should Local 67 become the bargaining agent for pipefitters at Superior Boiler the employer would eventually be required to enter into bargaining relationships with other building trade unions. If that were to occur, the degree of functionality available from his employees would decrease, and there would be, as Mr. DeFaveri frankly put it, a "detrimental effect on our business". In fact, Mr. DeFaveri questions whether in those circumstances the business of Superior Boiler would remain competitive.

9. Between the end of February, 2008 and May 5, 2008, Mr. DeFaveri did in fact turn his mind towards the Local 67 organizing campaign. During early March, 2008, counsel for Superior Boiler, Mr. Simmons, spoke with Joanne McMahon, a labour lawyer who acts for trade unions. Ms. McMahon had previously acted as counsel for the CNFIU. Mr. Simmons desired some information regarding the CNFIU. Ms. McMahon indicated that she would contact its President, Ann Waller, and advise her of his interest. Shortly thereafter Ms. Waller received a telephone call from Ms. McMahon, who advised her that a lawyer from Hamilton would be calling her who was interested in learning about the CNFIU. Ms. Waller considered this to be a "great" opportunity. The CNFIU has previously been provided trade union status under the Act, and is affiliated with the Labourers' International Union of North America.

10. Ms. Waller subsequently received a telephone call from Mr. Simmons, whom she understood at the time to be a lawyer who normally acts for employers. Mr. Simmons advised her that he had received her name and phone number from Ms. McMahon. Mr. Simmons indicated that he wanted more information about the CNFIU, and inquired as to whether Ms. Waller would be prepared to meet with him and one of his clients, Superior Boiler. She told Mr. Simmons that she was prepared to do so. Ms. Waller was content to attend a meeting with Superior Boiler management because she understood that they were interested in what the CNFIU might do for employees of Superior Boiler. Ms. Waller was happy to provide more information about the CNFIU and how it is unique in structure when compared with other trade unions. She provided Mr. Simmons with her e-mail address, and was advised that Mr. Simmons or his assistant would get in touch regarding a meeting.

11. The meeting that was eventually held was arranged through an exchange of e-mails between Ms. Waller and the assistant working with Mr. Simmons. On March 28, 2008, the assistant advised Ms. Waller that four people from Superior Boiler and Mr. Simmons would be attending the meeting. She proposed that the meeting be held in Hamilton. Ms. Waller responded by confirming that the date was fine, and indicated that she would make reservations at a restaurant. Subsequently Ms. Waller made reservations in her name at a restaurant in Hamilton, and confirmed those reservations with Mr. Simmons' assistant.

12. The next day the assistant sent an e-mail to Ms. Waller and asked that the location of the meeting be changed to the Superior Boiler offices. The reason for the move was said to be that Superior Boiler was not comfortable meeting at a restaurant. In fact, the assistant indicated in her e-mail to Ms. Waller that Superior Boiler was "concerned about the privacy and the ability to discuss this issue securely" if the meeting were held in a restaurant. Ms. Waller contacted the assistant and advised her that she was not prepared to meet at the offices of Superior Boiler because the meeting was after the close of business, she was the only woman in attendance, and she "did not like meeting on the employer's turf". Ms. Waller was content to meet at the offices of Mr. Simmons. Accordingly, Ms. Waller, Gerry Varricchio (at the time the Director of Organizing and a National Representative of the Labourers' International Union of North America, who acts as a liaison between that trade union and the CNFIU), Mr. Simmons and four members of Superior Boiler management, including Mr. DeFaveri and Mr. Gazzola, met at the offices of Mr. Simmons on April 2, 2008, at 5:30 p.m.

13. This meeting took approximately one hour. Mr. DeFaveri arranged for the meeting through his legal counsel because he desired to inform himself "of the different unions available". Ms. Waller spoke to those in attendance from Superior Boiler about the CNFIU and its structure. She indicated that the CNFIU is an affiliated local union of the Labourers' International Union of North America. Ms. Waller advised those present that the CNFIU model is to link itself to a number of independently-operated unions and in-house employee associations that are not affiliated with larger trade unions. The role of the CNFIU is to assist those unions and employee associations to maintain and protect their autonomy, and to establish an organization wherein local union representatives are able to access training and education in all areas of union representation for the benefit of their membership. There are a number of ways that an employee association can establish such a relationship with the CNFIU. Ms. Waller explained those options to Mr. DeFaveri and his colleagues. Ms. Waller noted that a potential benefit for an employer should the CNFIU represent its employees is that the employer would be dealing with an autonomous local union, and therefore individuals who know the workplace, rather than a national or international representative, who may not.

14. The executives from Superior Boiler advised Ms. Waller about the nature of its business operations, and informed her that the unions had been attempting to organize its employees, and to secure a voluntary recognition agreement, for a couple of years. Ms. Waller advised those in attendance that the CNFIU was not a construction industry union. The Christian Labour Association of Canada ("CLAC") was also a topic of discussion during this meeting, as was the fact that the CNFIU has a relationship with an employee association at the Naylor Group, which is a competitor of Superior Boiler.

15. At the end of the meeting, Ms. Waller and Mr. Varricchio left without any promise or obligation of further contact or involvement with Superior Boiler. Ms. Waller returned home, went onto the internet, and searched the CanLII website to see if Superior Boiler had been the subject of any legal proceedings. She found the two proceedings brought against Superior Boiler by the OPTC in 2007. At that point Ms. Waller had no expectation of signing any voluntary recognition agreement with Superior Boiler, because the unions were involved in organizing at the time and Ms. Waller realized that entering into a voluntary recognition agreement in that context was "fraught with problems and challenges". In addition, she knew that the CNFIU was not a construction industry trade union and therefore could not take the employees at Superior Boiler "wall to wall".

16. As noted above, on May 5, 2008, Bob Bolan from Local 67 advised Mr. DeFaveri that Local 67 was resuming its organizing campaign at Superior Boiler. The meeting between Superior Boiler and the CNFIU had occurred approximately one month earlier. On May 9, 2008, days after receiving the letter sent by Mr. Bolan, a "captive audience" meeting of employees was held in the warehouse section of the fabrication facility operated by Superior Boiler. The testimony of Luke Weatherson, which was not challenged in any meaningful way, and which I accept, establishes that the meeting started at 6:00 a.m., and lasted approximately one hour. A few days before the meeting the company had posted a notice of the meeting. That posting indicated that all employees were required to attend the meeting. Between 70 and 80 employees showed up.

17. Mr. DeFaveri and Mr. Gazzola were in attendance on behalf of management of Superior Boiler. Mr. DeFaveri led the meeting and spoke on behalf of the company. A large whiteboard was placed in the centre of the room, hanging off of a piece of equipment. Mr. DeFaveri spoke to the employees about the future of Superior Boiler from a labour relations perspective. He wanted the employees to know the options open to them. Accordingly, Mr. DeFaveri identified on the whiteboard three different choices available to employees in terms of potential unionization. The first option was an independent union that would allow for the control over the terms and conditions of collective bargaining to remain within the parties at Superior Boiler. The second option was identified by Mr. DeFaveri as a large, international union along the lines of the United Steelworkers of America. The third option that was identified by Mr. DeFaveri was Local 67.

18. I find that Mr. DeFaveri discussed each of the options during the course of this meeting. Mr. DeFaveri asserted otherwise during his testimony, insisting that Local 67 never came up for discussion at the meeting as an option. With all due respect, I find that evidence to be entirely incredible, and I reject it. As will become evident below, the main purpose for the meeting was to give Mr. DeFaveri an opportunity to bring home to the employees of Superior Boiler why choosing Local 67 as their bargaining agent would be a bad decision for the employer's business and for them personally. Given the views held by Mr. DeFaveri regarding the desirability of Local 67 becoming the bargaining agent for employees at Superior Boiler, the resumption of the Local 67 organizing drive, and the purpose of the meeting, there can be absolutely no doubt that Local 67 came up for discussion as an option during the meeting. Both Mr. Weatherson and Mr. Neskovic recall Local 67 being discussed in that fashion, and I accept their testimony.

19. Mr. DeFaveri did not speak positively at the meeting with respect to the option of employees choosing Local 67 as their bargaining agent. Mr. DeFaveri indicated that if that were to occur there was the possibility that employees then in the employ of Superior Boiler might lose their positions to other members of Local 67. Mr. DeFaveri also advised the employees present that because much of the work performed in the shop would not fall within the pipefitting trade, current employees would lose out on a large portion of the work being performed in the shop. Mr. DeFaveri indicated that if Local 67 were successful there would likely be a reduction in job opportunities, and that a number of employees would have to be laid off. The thrust of the comments made by Mr. DeFaveri was that a lot of work then being performed by employees would be lost should Local 67 successfully certify Superior Boiler. Mr. Weatherson testified that his impression from the comments made by Mr. DeFaveri was that should Local 67 successfully certify Superior Boiler, a price would be paid for doing so, and that he would be "looking for work somewhere else".

20. Mr. DeFaveri also made negative comments about the option of joining a large, international union such as the United Steelworkers of America. Mr. DeFaveri told the employees that by doing so they would lose the ability to determine their own priorities in collective bargaining.

21. With respect to the first option, joining an independent union, Mr. DeFaveri was much more favourably inclined. He advised the employees that if they went with that option they would have control over the terms and conditions contained in the collective agreement, and that collective bargaining would be run within the employer's own shop. Mr. Weatherson testified that the message sent by Mr. DeFaveri in this regard was that by adopting this option the employees would control the outcome of bargaining and that the employer "would stay the same" as it then was. Mr. DeFaveri referred to the CNFIU during his presentation as an independent union of this nature.

22. Mr. DeFaveri told employees gathered at this meeting that remaining non-union was not an option. He advised the employees that they had to organize, because if they did not, he believed that Local 67 would eventually be successful. As noted above, Mr. DeFaveri was of the view that if Local 67 successfully organized the employer's pipefitters the other building trade unions would soon follow, and that this would be a negative development for Superior Boiler.

23. Towards the end of this meeting Mr. DeFaveri suggested that each department nominate an employee to join a committee of employees to consider the various options open to them. A committee of that nature was established by the employees at the end of the meeting, consisting of approximately 8 or 9 members. Mr. John Neskovic, a Service Technician, was one of those individuals nominated to sit on this committee. He was the *de facto* leader of this committee. At the end of the meeting Mr. Neskovic was not entirely sure what to do next. Accordingly, he went to Mr. DeFaveri for help. Mr. Neskovic needed names, phone numbers and addresses to assist him, and asked Mr. DeFaveri to provide him with that information. Mr. DeFaveri subsequently provided Mr. Neskovic with a short memorandum in response to his request. Although there was some discrepancy in the evidence, on balance the evidence establishes that this memorandum was ultimately distributed to all of the employees of Superior Boiler.

24. The memorandum is addressed to all hourly employees in the various divisions of the business of Superior Boiler. The subject line of the memorandum reads "Employees Associations". It provides the recipient with "the contact names to obtain more detailed information in regards to the Employees' Association", namely those of Ms. Waller and Ms. McMahon, the lawyer for the CNFIU. The work addresses and phone numbers for Ms. Waller and Ms. McMahon are also provided on the memorandum. Mr. DeFaveri testified before the memorandum was entered into evidence that he recalled the phone number for Local 67 as being included on the document. However, that information is not on the memorandum. In fact, there is no other information on the memorandum but the names and contact information for Ms. Waller and Ms. McMahon.

25. Mr. Neskovic first became aware of the CNFIU during the course of the May 9, 2008 meeting. Before that time he knew nothing about the CNFIU. He acknowledged that in the absence of receiving the information from Mr. DeFaveri he would never have known who to

contact regarding unionization. He initially contacted Ms. McMahon, only to find that she had also provided legal services previously to Local 67, and was unable to assist him.

26. On May 21, 2008, Mr. Neskovic contacted Ms. Waller at the CNFIU. Ms. Waller was out of the office. The office assistant sent an e-mail to Ms. Waller that same day, indicating that Mr. Neskovic from Superior Boiler had called and would like her to call him to set up a time when she could meet with the committee of employees to present the pros and cons of the CNFIU, and what the CNFIU could do for them. Ms. Waller subsequently contacted Mr. Neskovic by phone. Mr. Neskovic wanted to secure more information about the CNFIU, and Ms. Waller told him that she would be happy to meet with the committee to provide that information. Mr. Neskovic indicated during this phone call that he wanted Ms. Waller to meet with the committee at the Superior Boiler offices. Ms. Waller would not agree to do so, and instead proposed that she book a room at a local hotel. Mr. Neskovic questioned why this was necessary, and Ms. Waller explained to him that during an organizing campaign the organizing had to be done at arms length from the employer. Mr. Neskovic was unhappy about meeting off-site - in fact, he was so annoyed that he indicated to Ms. Waller that "maybe we don't want to meet with you after all". Ms. Waller told Mr. Neskovic that that was for him to decide. Mr. Neskovic indicated that he would speak with his co-workers, and if they wanted to meet, he would call again.

27. During the course of their conversation on May 21, 2008 Ms. Waller asked Mr. Neskovic certain questions about the make-up of the workforce at Superior Boiler, such as the number of employees at the workplace, and the type of work they performed. Mr. Neskovic was surprised that she was asking him those questions, because he thought that she had previously secured that information through Mr. DeFaveri. Accordingly, he inquired of Ms. Waller whether she had met with Mr. DeFaveri previously. Ms. Waller advised Mr. Neskovic that she had met with Mr. DeFaveri, but that during that meeting she had not secured the information she was asking Mr. Neskovic to provide. Mr. Neskovic said nothing to Ms. Waller during this phone call to suggest that he was concerned about potential employer reprisal over his organizing activities.

28. Mr. Neskovic subsequently called the CNFIU office looking for Ms. Waller. Ms. Waller asked her colleague, Joe Daignault, to return the phone call because she and Mr. Neskovic "had not got off on a good step, because I wouldn't meet on the employer premises and he was not happy about it". She was also out of town at the time. Accordingly, she contacted Mr. Daignault and asked him to call Mr. Neskovic. If an opportunity to organize was there, Ms. Waller asked Mr. Daignault to run an organizing campaign.

29. Mr. Daignault had been invited to attend the meeting of April 2, 2008 at the offices of Mr. Simmons, but was ill and could not attend. He indicated that Ms. Waller had told him after the meeting that it had been a "good" one, but that she "had no idea if it was going anywhere or not". His next exposure to Superior Boiler was when he received a call from Ms. Waller to contact Mr. Neskovic and to follow up on the message he had left for her. Mr. Daignault did so. He spoke with Mr. Neskovic, secured information regarding the make-up of the employee complement at the workplace, and suggested that they ought to meet, with the employee representatives from other departments if they were interested. Mr. Neskovic indicated that he would see what he could do and would call back. He did call back a few days later, and asked Mr. Daignault to set up a meeting.

30. A meeting was subsequently set for the Holiday Inn in Hamilton, on June 11, 2008. Mr. Daignault did not set up a meeting at the workplace itself because to do so would be, in his view, "far too intimidating for employees". The employee committee representatives from Superior Boiler attended the meeting, which took approximately two hours. Mr. Neskovic advised Mr. Daignault of the Local 67 organizing drive at this meeting. Mr. Daignault was told that the employees at Superior Boiler "wanted nothing to do with the UA" and that the employees were looking for something else. No one advised Mr. Daignault of the captive audience meeting held on May 9, 2008. A general discussion ensued at the meeting regarding what the employees were, in fact, looking for from a union, the general structure of the CNFIU, and the dues that would be payable. Mr. Daignault secured more information about the work performed by employees at Superior Boiler. Mr. Daignault did not ask Mr. Neskovic how he had come to hear of the CNFIU, but, as noted above, he was aware of the meeting held on April 2, 2008.

31. Mr. Daignault attempted to push the group towards moving into an organizing campaign right away, but the group had arranged to meet with CLAC subsequently and therefore no organizing campaign started as a result of this meeting. At the end of the meeting it was agreed that Mr. Neskovic would contact Mr. Daignault once the meeting with CLAC had occurred. As it turned out, from this time forward Mr. Neskovic became the sole point of contact for Mr. Daignault. Mr. Daignault followed up with Mr. Neskovic the next week. He was advised to "back off" and was told that he would be contacted once the committee had finished its work and had made a decision. Mr. Daignault called Mr. Neskovic a few days later in any event. Mr. Neskovic told him that members of the committee had met with CLAC and that they had not reached a conclusion at that point.

32. After the meeting with CLAC, Mr. Neskovic secured approval from Mr. DeFaveri to hold another meeting with employees at Superior Boiler and to advise them of the steps that had been taken by the employee committee. That meeting was held at the employer's facility on or about June 20, 2008. It too was held in the early morning, and took about one hour. No one from management was present for the meeting. The three options put to the employees previously by Mr. DeFaveri were discussed by the employees present. Some employees raised the possibility of pursuing representation by Local 67, but Mr. Neskovic and other employees at the meeting told them that that was not an option. The evidence was unclear as to how it was that Mr. Neskovic was ultimately given the mandate by employees to pursue representation by the CNFIU. However, there is no doubt that Mr. Neskovic called Mr. Daignault shortly after this meeting and advised him that a decision had been made to pursue unionization through the CNFIU. According to Mr. Neskovic, the employees chose the CNFIU because they wanted to control their own future and did not want to be dictated to by other unions.

33. At this point, Mr. Daignault commenced an organizing drive, seeking membership applications from the employees of Superior Boiler. Mr. Daignault had discussions with Ms. Waller regarding the drafting of a flyer for use at Superior Boiler, and in particular how to address the existence of "the big boys out there" and other independents. Mr. Daignault indicated during his testimony that it was clear that Mr. Neskovic was looking for a union that "would not interfere" in how the employer performed its business – he wanted one that would provide employees protection but would not tell the employer "what to do". Mr. Daignault was of the view that the key competition for the CNFIU was CLAC. According to Mr. Daignault, it was very clear that Local 67 was not a competitor. Mr. Daignault testified that "the employees simply didn't want them. They were a non-issue during the campaign".

34. Two flyers urging employees to support the CNFIU and to sign membership cards were put together by Mr. Daignault and Ms. Waller on or about June 23, 2008. The flyers were distributed to employees through Mr. Neskovic. According to Mr. DeFaveri, these flyers were posted on at least two bulletin boards at Superior Boiler. Mr. Daignault agreed that between his first meeting with Mr. Neskovic and the representation vote taken in August, 2008, Superior Boiler did not distribute literature against either the CNFIU or CLAC, and agreed that in his experience employers subject to an organizing drive usually do.

35. A meeting was scheduled for employees of Superior Boiler to sit down with Mr. Daignault at LIUNA Gardens during the evening of July 30, 2008. A large number of employees showed up – at least 50 people. No managers from Superior Boiler were in attendance. The meeting lasted approximately one and one-half hours. There was a discussion at the meeting of what the CNFIU could do for the employees of Superior Boiler. There was interest shown by employees as to how the union was structured, particularly the fact that the bargaining unit at Superior Boiler would constitute its own local, such that the employees would reserve to themselves important decisions relating to bargaining on topics such as business flexibility. The topic of union dues was also discussed at the meeting. Mr. Daignault discussed how an application for certification would be filed with the Board, and, once certification was secured, how collective bargaining would commence and proceed. Mr. Daignault confirmed that the question of how an employer will respond to an organizing drive often comes up during this kind of meeting. It was not raised by the employees at this meeting. Nor was the topic of employer support raised. Mr. Daignault described the meeting as a "general, normal, organizing-type meeting" that brought him questions from all over the floor. Nothing in particular stood out. By the end of the meeting a large number of employees had signed membership cards, enough for the CNFIU to file its certification application, which it did on August 12, 2010.

## The Issues

36. The unions assert that Superior Boiler has violated sections 70, 72 and 76 of the Act and that the Board ought to make a declaration to that effect. It has pending before the Board certification applications that rely upon section 11 of the Act. As a result, it asked that the Board only make the declarations sought, and defer any further relief until its applications are brought back on for hearing. Superior Boiler denies that it violated the above-noted provisions of the Act, and asks the Board to dismiss the complaints. Should the Board determine that Superior Boiler has violated the Act, the employer agrees that a declaration to that effect is the only appropriate remedy at this time. The CNFIU takes no position with respect to the unfair labour practice applications brought by the unions.

37. The unions also assert that the application for certification brought by the CNFIU ought to be dismissed on the basis that Superior Boiler has provided the CNFIU with support that triggers the prohibition contained in section 15 of the Act. The CNFIU vehemently disagrees with the position taken by the unions. It asserts that it has done nothing inappropriate, that its application for certification ought to be granted, and that a certificate ought to issue. Superior Boiler takes no position with respect to this issue.

## Decision

### *(a) Violations of Sections 70, 72 and 76 of the Act*

38. Turning first to the question of whether Superior Boiler violated sections 70, 72 and 76 of the Act, the evidence clearly establishes that at the meeting with employees held on May 9, 2008, Mr. DeFaveri attempted to dissuade those present from joining the unions. In the face of an ongoing organizing drive by the unions, Mr. DeFaveri encouraged those in attendance to seek out a different trade union to represent them in the workplace. Subsequently, he provided a memorandum to all employees directing them to contact the CNFIU and/or the legal counsel known to act for the CNFIU. By committing these acts, Mr. DeFaveri, on behalf of Superior Boiler, improperly interfered with the selection of a trade union by Superior Boiler employees, in contravention of section 70 of the Act (see, for example, *Boehmer Box LP*, [2010] OLRB Rep. March/April 237, at paragraph 51, *JAK Electrical Contractors Limited*, [1997] OLRB Rep. July/August 578, at paragraph 142, and *Povoa Carpentry Trim*, [1988] OLRB Rep. November, 1174, at paragraph 4).

39. At that same meeting, Mr. DeFaveri also threatened the job security of the employees of Superior Boiler. He told employees that supporting Local 67 would likely cause employees to lose their employment for various reasons relating to competitiveness and his view of the continuing economic viability of the employer's business. His message was offered without any subtlety. That message was brought home to employees, as reflected by the unchallenged testimony of Mr. Weatherson, who confirmed his understanding that support for Local 67 would cause him to have to look for work somewhere else. Mr. DeFaveri improperly threatened his employees in order to ensure that they would not become members of Local 67. There can no dispute that making those threats is a violation of sections 72(c) and 76 of the Act (see, for example, *Boehmer Box LP*, cited above, at paragraph 53, and *JAK Electrical Contractors Limited*, cited above, at paragraphs 142 to 148).

### *(b) Application of Section 15 of the Act*

40. Whether the actions of Superior Boiler will have an effect upon the application for certification brought by the CNFIU depends upon the interpretation of section 15 of the Act. Section 15 of the Act reads as follows:

> 15. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*.

The parties agree that Superior Boiler did not participate in the formation or administration of the CNFIU, and did not contribute financial support to it. Accordingly, the question before the Board is whether the actions of Superior Boiler constitute the provision of "other support" to the CNFIU, such that the CNFIU ought not to be certified by the Board.

41. There are two lines of case authority that have developed at the Board regarding the interpretation of section 15. One line of authority stands for the proposition that section 15 of the

Act can only apply in situations where the trade union was aware of the support offered to it by an employer. If the trade union was not aware of that support, section 15 of the Act does not apply and an application for certification will be permitted to proceed. The second line of authority approaches the interpretation of section 15 of the Act differently. That line of authority stands for the proposition that whether the trade union was or was not aware of the support offered to it by an employer, should an employer support the certification of a trade union so as to undermine the free choice of its employees, that is enough to warrant dismissing an application for certification brought by that trade union.

42. The first line of cases is reflected by the decision of the Board in *Povoa Carpentry Trim*, cited above. In that case, an employer was subject to organizing drives by both Labourers' Local 183 and Carpenters' Local 27. The principal of the responding party told some of the company's employees that it would be better for the company and for them if they became members of Local 183 rather than members of Local 27. There was no evidence before the Board that Local 183 participated in, or was aware of, the actions engaged in by the company's principal.

43. The Board found that this behaviour constituted a violation of what are now sections 70 and 76 of the Act. However, the Board determined, at paragraph 7 of its decision, that section 15 of the Act had no application, because for section 15 of the Act to apply there must be some complicity between an applicant trade union and an employer. The Board cited *Cabral Foods Inc*., [1985] OLRB Rep. February 165, as an authority in support of its approach, and specifically disagreed with the Board's decision in *Consbec Inc*., [1986] OLRB Rep. July 937, to the extent that that decision was inconsistent with its approach.

44. The decision of the Board in *Cabral Foods Inc*. supports the position taken by the Board in *Povoa Carpentry Trim*. In *Cabral Foods Inc*., the evidence established that an employer hired individuals through a security agency in order to encourage employees to support one particular union over others. The evidence established that the union benefiting from that support had no knowledge that the company had employed these individuals in order to urge other employees to support its organizing campaign. Again, there was no doubt that the actions of the responding party in that proceeding constituted a violation of what are now sections 70 and 76 of the Act. However, the effect of that improper activity on the validity of the prior certificates provided to the union was an issue disputed by the parties.

45. The Board disagreed with the proposition that the lack of awareness by the union was an irrelevant factor when considering the application of section 15 of the Act. The Board made the following observations, at paragraph 35:

> Counsel for the applicant argued that sections 13 and 48 had the effect he contended for even if CURRE had been unaware of the support it had received. With respect to the issue of "employer support", the following cases were referred to in argument by one or more of the parties' counsel: [cases omitted]. None of these cases supports the contention that sections 13 and 48 can apply to support of which the affected union is wholly unaware. Sections 13 and 48 must be interpreted with reference to their obvious purpose, which is:
>
>> … to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer.

> (*Edwards & Edwards, supra*)
>
> In *Canada Crushed Stone, supra*, the Board described the purpose of section 13 (then section 12) this way at paragraph 27:
>
>> The broad purpose of the section, simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of employer support, does not owe its allegiance to those whom it seeks to represent. A trade union which has accepted the support of any employer whose interests may be affected by its representation places itself in a potential conflict of interest and thereby undermines itself as a union "qualified" to act on behalf of those it seeks to represent. Section 12 catches both the "sweetheart" arrangement between the parties directly affected and also the accepted support of any outside employer whose interest may be affected by the collective representation of those whom the union seeks to represent. In both instances *the union's acceptance of employer support activates the Section 12 bar*.
>
> If a trade union's ability to be certified or to enter into binding collective agreements could be destroyed by unsolicited employer behaviour of which the union was totally unaware, sections 13 and 48 would cease to serve as protections from employer interference in employees' selection of a bargaining agent and, instead, become potent instruments for effecting just such interference.

The CNFIU also relied upon similar observations by the Board in *John Lester Drugs Ltd.*, [1982] OLRB Rep. June 886, *Air Liquide*, [1964] OLRB Rep. January 558, and *Edwards & Edwards Limited*, (1952) 52 CLLC 17,027.

46. The position taken by the CNFIU in these proceedings is that the approach reflected by the Board in the above-referenced decisions ought to be applied to the facts, and that if properly applied, the only conclusion that the Board can reach is that a certificate ought to be granted to the applicant. The CNFIU argues that if unsolicited employer support that is totally unknown by a trade union were to be sufficient to trigger the application of section 15 of the Act, an employer that gets wind of an organizing drive can, by openly supporting the organizing union, effectively preclude that union from successfully securing a bargaining certificate. Here, it was asserted, the CNFIU is in that exact situation. It did not know that Mr. DeFaveri had urged employees of Superior Boiler to seek out the CNFIU, or that he had held a captive audience meeting, and it asserts that it ought not to be penalized because Mr. DeFaveri did so.

47. The second line of cases adopts a different approach to the application of section 15 of the Act. This line of cases is reflected by *Covertite Eastern Limited*, [1996] OLRB Rep. May/June 386. In that decision, an employer had a bargaining relationship with the Sheet Metal Workers' International Association, Local 47. The company's business was struggling, and the employees were clearly aware of that fact. A part-time working foreman was unhappy with the representation provided by the incumbent and decided he would contact CLAC. Two of the company's owners became aware of the situation, and communicated their preference for CLAC to employees. CLAC was not aware of those comments. When it subsequently brought a displacement application for certification, the incumbent took the position that the evidence reflected clear employer support for CLAC, and therefore that the application for certification brought by CLAC ought to be dismissed.

48. The Board ultimately dismissed the application, relying upon section 15 of the Act. The critical passages of the Board's decision are as follows:

> 56. The Board has made it clear in its jurisprudence that the purpose of section 15 is to preserve the arm's length relationship between unions and employers which is fundamental to the structure of the Act. A purposive, rather than literal, application of the section has found favour in the Board's jurisprudence, and is in our view the appropriate approach. Thus, not everything that an employer does that might be said to be supportive of an organizing campaign is sufficient to warrant the application of section 15. It is activity which is of a character or proportion such that it is reasonable to infer that employees have not exercised a free choice in the matter of the section of a bargaining agent. …
>
> 57. Here, there is no evidence that when Mr. Juhasz contacted CLAC he was doing so on the initiative of the employer, or in collusion with the employer. The evidence is that Mr. Juhasz knew of CLAC from his own experience, and independently decided that an alternative to Local 47 was necessary. Subsequent to that, it is clear that the employer welcomed the idea.
>
> 59. … However, it is clear from the evidence that both Messrs. Warner and O'Hara intended to communicate to their employees, both at the foreman level (e.g. the conversation with Mr. Strenkowski), and below (the conversation with Messrs. Beauchamp and Thibeault in Hawkesbury) that CLAC would be good for them and the company and that Local 47 was not.
>
> 60. Both the employer and CLAC argued that the company's behaviour should not affect the results of the vote taken in this matter. … Even if the support here is not as extensive or as overt as in some of the cases, it is our finding that it was clear and significant, and does qualify as "other support" in the terms of section 15.
>
> 61. What took place here was a clear expression by the employer of desire to have CLAC, rather than Local 47, represent its employees. It took place in a context where the employer had been emphasizing its precarious financial situation for months. Wage rates were a constant theme coming from Mr. O'Hara in particular; he had made it very clear to his men in a number of ways that the collective agreement rates were not in his view viable. … In the Board's view, when the message extended to specific support for another bargaining representative, the line set by section 15 was crossed. That is, "other support" has been provided in a manner in which the Board cannot be satisfied that the employees were freely, for their own reasons, choosing CLAC over Local 47, rather than simply respecting their employer's preference. The context of the "unaffordability" of the Local 47 wages, gave a specifically sharp and persuasive focus to the employer's expression of support for CLAC. The combination of circumstances amounts to pressure to vote for CLAC.
>
> …
>
> 64. It was argued on behalf of CLAC that it was not palatable to have this application dismissed and have to wait until the next open period when it had done nothing wrong. The application of section 15 is not reserved for cases of collusion between a union and the employer, although they may be the cases that

> cry out most strongly for intervention. The fact that the applicant did not collude with the company is something we have taken into account. Nonetheless, the actions of the company have in our view lent such support to the CLAC campaign that we are of the view that section 15 applies. The result is one mandated by the Act in such circumstances; it is not a penalty to CLAC. It is one of the ways the statute attempts to preserve the right of employees to freely choose their own bargaining representative.
>
> 65. In the circumstances, and further to section 15 of the Act, the Board is unable to certify the applicant, and the application for certification is dismissed.

The unions rely upon other cases that have adopted a similar approach, namely *Tri-Canada Inc.*, [1981] OLRB Rep. October 1509, *Coons Heating & Sheet Metal Limited*, [1978] OLRB Rep. June 525, *Pre-Eng Contracting Ltd.*, 2008 CanLII 17078, and *Michael Monteith Enterprises Limited*, 2009 CanLII 45672.

49. As noted above, the CNFIU asserts that the first line of cases reflects the appropriate approach to be taken by the Board to the interpretation of section 15 of the Act. Counsel for the CNFIU argued passionately that the Board ought to adopt that approach in these proceedings and issue to the CNFIU the certificate that it would normally secure as a result of the representation vote previously taken. Counsel argued that there is no evidence of collusion between the CNFIU and Superior Boiler. Prior to the meeting held on April 2, 2008, Ms. Waller did not know why Mr. DeFaveri desired to meet. At that meeting, no employee list was provided to the CNFIU, nor was any employee contact information provided. No money changed hands, no access to the workplace was agreed upon, and no voluntary recognition agreement was entered into. Quite simply, counsel asserts that the usual indicia of employer support for the CNFIU are absent.

50. It was submitted by counsel that the reference made by Mr. DeFaveri to the CNFIU and the other unions at the May 9, 2008 meeting of employees was in fact accurate, to the extent that his reference was to their different structures. In fact, counsel submits that the reference by Mr. DeFaveri to the CNFIU cuts both ways. On the one hand, counsel argued that such a reference might be considered to be "good advertising" for the CNFIU, providing it with an advantage. On the other hand, counsel submitted that such a reference might have had the opposite effect, because employees are not necessarily attracted to a trade union that is suggested by the employer and may well turn to the trade union which the employer suggests is a bad choice. It was further asserted that the potential effect of Mr. DeFaveri distributing the contact information for the CNFIU shortly after the May 9, 2008 meeting was offset by the fact that contact information for Local 67 was readily available to employees by that time, given the long-standing organizing drive. In fact, counsel noted that contact information for Local 67 is easily available by looking through a phone book or by going onto the internet. One way or another, counsel notes that the CNFIU did not solicit the reference made by Mr. DeFaveri, and that it had no knowledge before the meeting that it would be identified. Furthermore, during the time that the CNFIU organized the employees at Superior Boiler, neither Ms. Waller nor Mr. Daignault was aware of the substance of the meeting of May 9, 2008.

51. Counsel for the CNFIU urged the Board to conclude that all of the events that occurred after the May 9, 2008 meeting constituted a "cleansing period". Counsel asserted that once Mr. Neskovic and the committee of employees commenced its investigation into which union to choose, the situation normalized. The employees inquired of the CNFIU regarding dues, benefits,

and brought their key complaints to Mr. Daignault. Mr. Daignault wanted to start a quick campaign, but the committee thought otherwise. Counsel submitted that it was the committee that was in control, and it wanted to investigate CLAC. This establishes that the committee was looking at different options and was not immediately driven to the CNFIU, distinguishing the situation from *Covertite Eastern*, cited above. Counsel noted that weeks later the employee committee met with the employees, without the employer present, and considered the various options. The CNFIU was chosen by the employees, and Mr. Neskovic was tasked with moving that option forward, which he did.

52. It was submitted by counsel for the CNFIU that the organizing drive that followed was normal in all facets. Flyers were prepared and circulated. A meeting followed in which Mr. Daignault attended on behalf of the CNFIU. It was off-site, no employer representative was present, and the meeting was attended by a high proportion of employees notwithstanding that it occurred on a Friday night in the summer. Counsel submitted that Mr. Daignault was "asked a lot of pointed questions" at the meeting, and satisfied the inquiries made. Counsel asserted that the employees who signed membership application cards at the meeting did so freely, after making an informed decision as to representation. The secret representation vote that occurred pursuant to the CNFIU certification application reflected that an overwhelming number of employees desired CNFIU representation, and counsel asserted that the result of that vote should be confirmed. Counsel stated that the employees in question ought to be considered sufficiently sophisticated that their wishes as reflected by the representation vote ought to be honoured. Counsel also noted that all events occurred in the context of a long, failed organizing campaign brought by Local 67, one that reflected little support by Superior Boiler employees. She submitted that the comments made by Mr. DeFaveri at the May 9, 2008 meeting did not affect that lack of support – it merely reflected the "state of the nation" as it had been for years.

53. Finally, counsel for the CNFIU argued that both lines of cases that apply section 15 of the Act can co-exist, side-by-side. Because of the risk of employer mischief, counsel argued that the Board should hesitate to apply section 15 in cases where the union was unaware of the interference. Counsel submitted that the key in all of these cases is whether the impugned behaviour of the responding party employer so impacted the efforts made to organize employees that it could only be concluded that the true wishes of the employees were not reflected by the representation vote resulting from the certification application brought by the trade union that is said to have benefited from the company's behaviour. In most cases where the trade union is not aware of that behaviour, section 15 of the Act is not applied because the representation vote reflects the true wishes of employees. It is only in extreme cases where the result of the representation vote is undermined that the Board resorts to dismissing the application. In this case, counsel submitted that the wishes of employees are very clear and entirely reliable. Counsel argued that the employees were aware of the employer's views, investigated them, and made a free choice. Counsel submitted that there is no suggestion that the CNFIU is a "company union" of the sort that section 15 is intended to eliminate.

54. In my view, the place to start one's consideration of this question is section 2 of the Act. Section 2 states that one of the purposes of the Act is to facilitate collective bargaining between employers and trade unions that are the *freely-designated* representatives of the employees. Subject to remedial certification authorized by section 11 of the Act, in the normal course a trade union can secure a certificate from the Board only if it can establish that it is the "freely-designated" representative of the employees in the bargaining unit. It is this underlying

purpose of the Act that informs the approach taken by the Board to section 15 of the Act that is reflected by *Covertite Eastern Limited*, cited above. In that decision, at paragraph 56, the Board notes that it is employer support "which is of a character or proportion such that it is reasonable to infer that employees have not exercised a free choice in the matter of the selection of a bargaining agent" that triggers the application of section 15. The Board must be satisfied that the choice made by employees is, in fact, a reflection of the free will of the employees in question, and not something else.

55. It is for this very reason that I do not disagree with the assertion by counsel for the CNFIU that the two lines of cases identified during argument can co-exist, side-by-side. In clear cases of collusion between an employer and a trade union, there can be no doubt that section 15 of the Act ought to apply to preclude that trade union from successfully bringing an application for certification. An employer in those circumstances has clearly offered support to the trade union that has the effect of eliminating any pretence that the employees have freely chosen the trade union to represent them as their bargaining representative with an employer. The critical arms length relationship that underpins the Act does not exist, and a trade union ought not to be given the authority to represent employees of an employer in those circumstances.

56. Are situations of collusion the only circumstances under which section 15 of the Act can apply? Some of the decisions relied upon by the CNFIU assert this to be the case. In my view, section 15 of the Act ought not to be limited to cases in which it is established that there has been collusion between an employer and a trade union. Section 15 can be applied to situations in which a trade union is unaware of the support given to it by an employer, if an objective assessment of the circumstances allows the Board to conclude that due to the actions of that employer the trade union cannot be reasonably said to be the freely-designated representative of those employees. This is the exact point made by the Board in *Covertite Eastern*, cited above, at paragraph 64.

57. A main concern raised by the CNFIU during argument regarding the application of section 15 in this manner (and noted in a number of the Board's prior decisions such as *Povoa Trim Carpentry* and *Cabral Foods Inc.*, cited above) is the possibility of employer mischief. I agree that an employer ought not to be permitted to undermine an organizing drive brought by a *bona fide* trade union by securing and passing around material on behalf of that union and urging its employees to support it by signing membership evidence where that union has no knowledge that the employer is doing so. There is no question that the CNFIU is a *bona fide* union, and it asserts that its legitimate organizing drive has been undermined in exactly this fashion.

58. In my view, this rationale is insufficient to support the proposition that the application of section 15 ought to be limited to cases of collusion. Cases such as *Covertite Eastern*, *Tri-Canada Inc.* and *Coons Heating & Sheet Metal* have been around for decades. Cases in which it is asserted that an employer has responded to an organizing drive by actively supporting the organizing union do occur, but they are rare. Presumably this is because an employer would find itself in a difficult position asserting as a defence to an application for certification that its own unlawful behaviour (a breach of sections 70 and 76 of the Act) was so significant that it undermined employee free choice and ought to warrant a dismissal of that application. The Board might in those circumstances conclude that the behaviour of the company was insufficient to warrant the conclusion that the ability of the employees to freely choose its bargaining representative had been undermined by the employer. Alternatively, the company's behaviour

might be viewed as being so egregious that it warrants the application of remedial certification pursuant to section 11 of the Act. As a result, employers typically respond to union organizing the way that Mr. Daignault testified that he experienced it – they communicate to employees the reasons why they believe that the employees do not need representation in the workplace. Accordingly, although I appreciate that there is a possibility that the mischief identified by the CNFIU may manifest itself, as a practical matter it happens, at best, rarely.

59. On the assumption that the approach reflected by the Board in *Covertite Eastern* could be applied to the facts of this case, the CNFIU argued that it is the freely-designated representative of the employees of Superior Boiler, having regard to the circumstances under which membership cards were signed, and having regard to the result of the representation vote taken in August, 2008. It suggests that everything that occurred after the employee meeting of May 9, 2008 effectively cleansed what Mr. DeFaveri stated at that meeting, and that the CNFIU ought not to be penalized because Mr. DeFaveri urged employees to investigate it, particularly in light of the textbook organizing campaign that it undertook. I take issue with the position asserted by the CNFIU on this point. In my view, an objective analysis of the facts can only lead to one conclusion, namely that the CNFIU is not the freely-designated representative of the employees of Superior Boiler.

60. The evidence establishes that by February 25, 2008, the date of the meeting between Superior Boiler management and the unions at the Local 67 hall, the organizing campaign of the OPTC, though continuing, had lost momentum. By the end of that meeting, the unions determined to suspend all organizing in the hope that it would be able to answer the further inquiries of Mr. DeFaveri and persuade Superior Boiler to sign a voluntary recognition agreement. It is impossible to say what would have happened had Local 67 continued to actively organize through early May, 2008. All that we do know is that by the end of February, 2008, the campaign launched by the unions some two years earlier had slowed.

61. The CNFIU asserts that as at May 9, 2008 the Local 67 organizing campaign was moribund because the employees of Superior Boiler had no desire whatsoever to join that union. It is not clear to me that that assertion is correct. Mr. DeFaveri and management of Superior Boiler considered Local 67 to be a sufficient threat to its business that during what turned out to be an eight week pause in organizing they took active steps to secure information regarding the CNFIU and its structure, a structure that Mr. DeFaveri considered far more amenable to his business. It is also known that once Local 67 indicated to Mr. DeFaveri that it had restarted its organizing campaign, Mr. DeFaveri immediately scheduled a captive audience meeting with Superior Boiler employees and used that meeting to threaten his employees against joining Local 67 and to urge them to join a union such as the CNFIU. Mr. DeFaveri was sufficiently certain that Local 67 had enough steam left in its organizing campaign that he counselled employees against the option of remaining non-union, because to do so in his mind would effectively result in Local 67 eventually securing enough support to apply for certification. As a result, the assertion made by the CNFIU that as at May 9, 2008, the Local 67 campaign had effectively ended is certainly not reflected by the severe actions taken by Superior Boiler management. They were clearly of the view that the Local 67 organizing campaign still had legs and was a threat to the employer's business.

62. There can be no doubt that the statements made by Mr. DeFaveri at the meeting of May 9, 2008, and his subsequent distribution of the memorandum to employees, eliminated any

ability that Local 67 might have had to successfully continue its organizing campaign. The message sent by Mr. DeFaveri to those in attendance at the meeting was crystal clear. Local 67 is bad news for Superior Boiler. If employees choose to support representation by Local 67, that support will cost individuals their jobs. Employees in attendance at the meeting understood that message. Subsequent observations by Mr. Daignault that employees of Superior Boiler "simply didn't want" to be represented by the OPTC or "wanted nothing to do with the UA" only serve to highlight that Mr. DeFaveri was extremely effective in what he set out to do at the May 9, 2008 meeting. In light of the threats to job security made at that meeting, the lack of interest shown by employees towards the OPTC is hardly surprising.

63. But turning away from Local 67 was not the only message that Mr. DeFaveri sent to employees during the course of the May 9, 2008 meeting. The other message was that unionization was necessary, because if another trade union were to secure bargaining rights, that would effectively block Local 67 from securing its bargaining rights at Superior Boiler. Remaining non-union was not an option, because then Local 67 would ultimately succeed – and that would not be good for Superior Boiler or its employees. As a result, Mr. DeFaveri determined that he would provide an impetus to employees to pursue representation by the CNFIU. In the same meeting that Mr. DeFaveri threatened the job security of his employees, he urged employees to sign up with a union that was flexible enough to ensure that collective bargaining took into account the needs of the business of Superior Boiler. As a result of his meeting with Ms. Waller, Mr. DeFaveri had the information he needed to tout the CNFIU as that union. By any objective standard an employee in attendance at the meeting could have understood only one thing – that they were being told by their employer to reject Local 67 as a bargaining representative, and to seek out the CNFIU for representation.

64. Mr. Neskovic was the leader of those employees tasked by other employees to review the options available resulting from the meeting held on May 9, 2008. Notwithstanding the able argument put forward by counsel for the CNFIU, I do not consider that there was ever any legitimate question as to what the result was going to be. Mr. DeFaveri made it quite clear at the May 9, 2008 meeting that his preferred option was for employees to join the CNFIU.

65. If for any reason that message was not clearly communicated to employees at the May 9, 2008 meeting, it certainly was brought home to them shortly after the meeting, when Mr. DeFaveri circulated a memorandum to all employees regarding how they could secure information about employee associations. Mr. DeFaveri provided to employees the names and contact information of two individuals intimately familiar with the CNFIU – its president and its legal counsel. No other option was identified. Mr. DeFaveri was not satisfied to merely provide that information to Mr. Neskovic, but instead reiterated his preference to all employees by circulating the memorandum plant-wide. Accordingly, within a day or two of the May 9, 2008 meeting, all employees understood that the position of management was that they ought to seek representation through the CNFIU.

66. There can be no doubt that the employees of Superior Boiler understood management's preferred option. Proof of that understanding is established by the fact that the first call made by Mr. Neskovic was made to Ms. Waller at the CNFIU. It is notable that Mr. Neskovic became annoyed at Ms. Waller during the course of this call when she indicated that she was not prepared to attend at the Superior Boiler premises in order to introduce herself and the CNFIU to the employee committee. Mr. Neskovic was so annoyed, and got off on such a bad footing with Ms.

Waller, that Ms. Waller eventually asked Mr. Daignault to take responsibility for the organizing drive. Mr. Neskovic had absolutely no concerns at all about having an initial union organizing meeting at the premises of Superior Boiler – something that Mr. Daignault confirmed in his testimony would be "far too intimidating for employees".

67. Just as importantly, it is evident that Mr. Neskovic became aware early on that Ms. Waller and Mr. DeFaveri had met prior to May 9, 2008. During the course of their first call Mr. Neskovic indicated to Ms. Waller that he believed that some of the basic, background information she was probing him for had previously been given to her by Mr. DeFaveri. Ms. Waller disabused him of that understanding. However, it is clear that Mr. Neskovic had learned that Mr. DeFaveri and Ms. Waller had previously met, which could only have brought home to Mr. Neskovic that the CNFIU was the preferred choice of management.

68. The message that the CNFIU was the preferred choice of management was reiterated in a number of ways during the course of the CNFIU campaign. The CNFIU prepared two different flyers for distribution to Superior Boiler employees during the course of the organizing campaign. The evidence established that those two flyers were pinned to at least two bulletin boards in the Superior Boiler plant. There is no evidence that management removed those flyers, or that the employer responded to the flyers in any form. Employers that are the target of a *bona fide* organizing campaign typically do not permit union organizing material affixed to plant bulletin boards to remain there. Furthermore, in most cases, though not all, employers choose to respond to some of the assertions made by the union in flyers that are passed around a plant. Mr. Daignault acknowledged that employers typically do respond to flyers of this nature during an organizing campaign. That is also the Board's experience. Here, Superior Boiler permitted the organizing material to stay posted in the workplace, and did not respond to the claims made in that material. In the context of what happened at the May 9, 2008 meeting, any reasonable employee of Superior Boiler could only have interpreted the posting of the flyers and the failure of the employer to remove them or to comment upon them as further evidence of employer support for the CNFIU.

69. Finally, the employee committee did pursue representation by CLAC. There was very little evidence called regarding the efforts made in that regard. There appears to be no dispute that one or more employees on the committee met with CLAC, and that some literature regarding CLAC was secured by those individuals. However, there was no evidence called to suggest that CLAC was ever considered by the employee committee as a serious alternative to the CNFIU. Nor, of course, was Local 67. That became quite evident during the meeting of employees held by the employee committee on June 20, 2008. At that time, the suggestion made by at least one employee in attendance that Local 67 be considered as an option was dismissed immediately by Mr. Neskovic and others.

70. It is with this background in mind that the question of whether the employee signatures on membership cards in support of the CNFIU, and the subsequent ballots in favour of representation by the CNFIU disclosed by the representation vote, can be considered to reflect the free choice of those employees. In my view, the only reasonable answer to that question is that they do not. There is no evidence to suggest that before this litigation commenced Ms. Waller or Mr. Daignault ever became aware of the threats made by Mr. DeFaveri at the meeting held on May 9, 2008. It is also true that Mr. Daignault answered many questions posed by the employees of Superior Boiler at the July 30, 2008 meeting during which most of the membership cards in

support of the CNFIU were secured. However, in my view it is simply not reasonable to conclude that the initial threats made by Mr. DeFaveri and his obvious preference for the CNFIU had no effect on the decisions made by employees to sign membership applications in support of the CNFIU, or to cast a ballot in support of the CNFIU during the subsequent representation vote. There was never any "cleansing". In the face of dire threats regarding their future employment and their employer's obvious preference for the CNFIU as its employees' bargaining agent, it is simply not possible to view the events leading up to the meeting of July 30, 2008 or that meeting itself as negating any of the concerns that were undoubtedly held by the employees of Superior Boiler.

71. Section 15 is not a provision that is only intended to preclude certificates being issued to unions that collaborate or conspire with employers to secure bargaining rights in order to represent those employers' workers. It serves a broader purpose, one that provides the Board with the authority to preclude a trade union from securing bargaining rights when it is evident that, even in the absence of that trade union's involvement, the employees have not been afforded the right to freely choose a bargaining agent to represent them. The interests of the trade union that is the innocent beneficiary of that support are by necessity subordinated to the interests of the employees as a whole in order to ensure that the choice of a bargaining representative made by those employees is a voluntary choice. As noted by the Board in *Michael Monteith Enterprises Limited*, 2009 CanLII 45672, cited above, at paragraph 70:

> This part of the case is about whether the employees in the bargaining unit would have been able to exercise a free choice in the selection of their bargaining agent. The character of the support given to CLAC through the manner in which Mr. Lumley organized, and the position he held with this employer, convinces me that employees would not have been able to express their true wishes in that context. The support provided was sustained and material and of assistance to the CLAC organizing drive. It prevented the employees a choice free from employer interference.

I reach this same conclusion on the facts of this case. The support given to the CNFIU by Superior Boiler was sustained, material and was of the utmost assistance to the CNFIU. Quite simply, the CNFIU would not have been approached by Mr. Neskovic in the first place but for the actions of Mr. DeFaveri on behalf of Superior Boiler. Those actions prevented the employees of Superior from making a free choice regarding who would become their bargaining representative.

**Remedy**

72. Having regard to the conclusions reached above, the Board:

(a) declares that Superior Boiler contravened sections 70, 72 and 76 of the Act; and

(b) declares that Superior Boiler offered "other support" to the CNFIU as defined by section 15 of the Act. The Board is unable to certify the CNFIU, and its application for certification is therefore dismissed.

Any other remedies available to the unions in the unfair labour practice proceedings will await the litigation of the remaining issues in those and the other proceedings brought by Local 67, the OPTC and/or Local 787.

73. These proceedings are referred to the Labour Relations Officer assigned to these files to contact the parties in order to resolve the outstanding proceedings and/or, if necessary, facilitate the continued litigation of them. In light of the dismissal of the CNFIU certification application, it is not evident that the CNFIU maintains any legal interest in the remaining proceedings. If the status of the CNFIU remains in issue, the parties can arrange for a conference call through the Registrar's office to deal with that issue.

74. Superior Boiler is directed to post copies of this decision immediately, in one or more places where they will most likely come to the attention of its employees. These copies must remain posted for 30 days.

75. I am seized of these proceedings.

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**0607-09-R; 0678-09-R; 0969-09-U TIERCON CORP.** (formerly 1675386 Ontario Inc.), Applicant v. Workers United Ontario Council and UNITE HERE International Union, Responding Parties; Owens Corning Composite Materials Canada LP, Applicant v. Workers United Ontario Council, UNITE HERE and UNITE HERE Local 1305, Responding Parties; UNITE HERE, Applicant v. Workers United Ontario Council and ARAMARK Canada Ltd., Responding Parties

**Bargaining Rights – Trade Union – Union Successor Rights – Unfair Labour Practice – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of "constitutional continuity" – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional**

**continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues**

**BEFORE**: *Lee Shouldice*, Vice-Chair.

**APPEARANCES:** *Donald K. Eady, Andrea Bowker, Alexandra Dagg* and others for Workers United Ontario Council; *James Hayes, Nick Worhaug, Paul Clifford* and others for UNITE HERE.

**DECISION OF THE BOARD:** December 15, 2010

## I. Introduction

1. These three proceedings consist of two applications filed with the Board seeking a declaration of successor status pursuant to section 68 of the Act (Board Files No. 0607-09-R and 0678-09-R) and an unfair labour practice application filed with the Board pursuant to section 96 of the Act (Board File No. 0969-09-U). There are a number of other proceedings that have been filed with the Board (and certain other requests that have been made of the Minister of Labour) that are all "on hold" pending a decision of the Board in these three proceedings. The parties have agreed that the result of this decision will apply to all of those outstanding matters.

2. The breadth of the dispute between the trade union parties to these proceedings was at one stage much greater than the list of proceedings referred to above. The broader dispute between Workers United, the Service Employees International Union ("the SEIU") and UNITE HERE (sometimes referred to in this decision as "the International" or "the union") was the genesis of considerable litigation before the courts in the United States, the National Labor Relations Board, and the courts here in Ontario. On July 27, 2010, counsel for the trade union parties advised the Board that there had been an overall resolution of the dispute between UNITE HERE, Workers United and the SEIU. Regrettably, that resolution was not sufficiently comprehensive to encompass any of the proceedings filed with the Board. Accordingly, these proceedings continued through to argument.

3. These three applications were filed with the Board during May and June, 2009. The Chair of the Board was seized with these proceedings when, on May 18, 2010, he was appointed a Judge of the Superior Court of Justice of Ontario. As a result of the Chair's judicial appointment he was unable to continue to hear and determine these proceedings (see section 55 of the *Judges Act*, R.S.C. 1985, c. J-1, as amended). I was subsequently assigned by the Interim Chair to hear and determine these proceedings.

4. In the circumstances, the Board expedited the hearing of these proceedings and scheduled 17 hearing dates for June, July and August, 2010. In accordance with my decision dated July 8, 2010 (reported at [2010] OLRB Rep. July/August 568), the witnesses previously called to testify were called once again to provide evidence. Incorporated into the testimony given by each witness was the evidence he or she had offered previously by way of reference to verbatim transcripts that had been prepared of the hearing before the former Chair by a certified court reporter at the request of UNITE HERE. Each witness confirmed that he or she continued to have a present recollection of the questions and answers previously given and adopted that testimony, except to the extent that each desired to (and did) make clarifications to that earlier testimony. Each witness was made available for cross-examination by opposing counsel (each of

whom quite properly took full advantage of the opportunity to do so), and further exhibits were filed with the Board. Workers United Ontario Council and UNITE HERE have both, through counsel, filed written argument with the Board. In addition, counsel provided oral argument to the Board over two days of hearing on August 24 and 25, 2010.

5. It is important that the reader appreciate the broader context within which decisions were made by representatives of each of the active participants. The facts are described below in considerable detail because they provide a critical context for the purpose of understanding why certain decisions were made by those participants. The evidence reflects that for the three-month period commencing on or about December 18, 2008, and ending on or about March 16, 2009, there was an intense battle waged between the UNITE HERE Ontario Council, on the one hand, and UNITE HERE and UNITE HERE Local 75, on the other. At stake in Ontario was the ability of the UNITE HERE Ontario Council to disaffiliate from UNITE HERE. The evidence also establishes that there was an equally intense battle waged in the United States between the UNITE side of the union and the HERE side of the union which was ongoing at all relevant times. This was undoubtedly a frantic three month period for all participants. A lot happened in a relatively short period of time.

6. As often occurs in situations such as these, decisions were made by all participants "on the fly" that made sense having regard to the circumstances that they believed to exist at the time. Some of those beliefs have since turned out to be inaccurate. Once the parties were into the litigation and had the advantage of 20/20 hindsight, they have taken certain "square peg" facts and decisions made as events developed and attempted to reshape them so as to fit into the "round hole" legal principles utilized by the Board in determining proceedings such as these. I have assessed the evidence given and the positions of the parties adopted with this reality in mind.

7. The parties have agreed that the simple question to be answered in this portion of these proceedings is whether the Workers United Ontario Council (hereinafter the "WUOC") is the same entity as, or the successor to, the UNITE HERE Ontario Council (hereinafter the "UHOC"). The parties agreed that the question of which entity controls the bargaining rights in play in these proceedings would be dealt with subsequently. I have not addressed that question in this decision, although the argument of the parties, particularly that of the WUOC, regularly treaded onto that ground.

8. By decision dated November 4, 2009, the former Chair of the Board found that the WUOC was a trade union for the purposes of the Act as of March 16, 2009. As will become clear, on that day the WUOC was still styled as the "Ontario Council". It was not until March 21, 2009 that the Ontario Council became affiliated with Workers United and changed its name to the WUOC. However, there appears to be no dispute that the Ontario Council was a trade union for the purposes of the Act on March 16, 2009, and that the WUOC was a trade union for the purposes of the Act on March 21, 2009.

## II. Credibility

9. As noted above, both the WUOC and UNITE HERE submitted written argument to the Board. A significant portion of the written argument submitted by UNITE HERE dealt with the credibility of the witnesses who testified. The written argument submitted by the WUOC made reference to the credibility of the witnesses on an issue by issue basis, as necessary. Alex Dagg,

an Executive Vice President of Workers United, the Canadian Director of Workers United, and the Director of the WUOC, testified on behalf of the WUOC. On behalf of UNITE HERE, the Board heard testimony from Paul Clifford, the President of UNITE HERE Local 75 ("Local 75") and an Executive Vice-President of UNITE HERE, and from John Wilhelm, who is now the General President of UNITE HERE. At all relevant times for the purpose of these proceedings Mr. Wilhelm was the President/Hospitality of UNITE HERE.

10. During the course of oral argument counsel for the WUOC submitted that the focus by UNITE HERE upon the credibility of Ms. Dagg was a "smoke screen" to distract the Board from the real issues. He disputed the assertions made by UNITE HERE regarding the quality of the evidence offered by Ms. Dagg, but argued that it was unnecessary for the Board to make any credibility assessments for the purpose of determining the question to be answered. He asserted that to make those assessments would merely establish something that everyone in the labour relations community already knows, namely that the Marquess of Queensbury rules do not apply to union politics. The WUOC asserts that UNITE HERE maintains the position it does in these proceedings and has focused upon the credibility of Ms. Dagg in an attempt to "take out" the highest profile WUOC leader. UNITE HERE takes issue with this characterization, and asserts that its focus upon credibility is both necessary and appropriate in the circumstances.

11. I am of the view that the credibility of the witnesses does play an important role in these proceedings. At the very least, the question of credibility is raised by an assertion made by the WUOC that an agreement entered into by the UHOC and Local 75 on March 14, 2009 was intended by the parties to serve a certain purpose. Accordingly, I will comment upon the credibility of each witness below to the extent necessary to deal with individual events of relevance. I also believe it appropriate at the outset to make brief observations regarding the testimony of the witnesses generally.

12. When dealing with questions of credibility I have been guided by well-established principles stated almost 60 years ago by O'Halloran J.A. in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at page 356:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

13. Having regard to the principles set out above, as a general observation I found Mr. Clifford and Mr. Wilhelm to be forthright witnesses, direct and open in the testimony they gave in chief and in the answers they provided on cross-examination. In most cases they answered questions put to them in a straightforward manner that made sense, having regard to the circumstances. For the most part, each was prepared to concede during his testimony in cross-examination those facts that were not supportive of the position taken by UNITE HERE. Furthermore, they were not witnesses who purported to have a memory of occurrences that they thought would be helpful to their case but an absence of memory of things that might not have

been so helpful. On certain limited occasions I have not accepted their testimony as accurate. I make reference to those occasions below.

14. The testimony of Ms. Dagg was central to this proceeding, and her evidence consumed the majority of hearing time devoted to oral testimony. Her oral testimony before me and the testimony she previously gave before the former Chair of the Board was, for the most part, consistent. Regrettably, I found Ms. Dagg to be a witness whose testimony was very difficult to accept at face value. It became evident during the course of her testimony that Ms. Dagg tends to perceive objective events through an oddly-shaped lens that has the effect of distorting those events into a shape that is markedly different than that experienced by others. The perception experienced by Ms. Dagg is usually consistent with what is in her best interests in the circumstances. I found Ms. Dagg's memory to be particularly sharp when the subject matter was something that was helpful to her position, but that she had very little recollection of events that might have cast her in a less favorable light.

15. The testimony offered by Ms. Dagg reflected a very political style in dealing with questions of fact, a style which was often characterized by her adopting extremely fine distinctions during cross-examination in order to disagree with a proposition put to her for consideration. This style may have served her well over the years in her day-to-day role as a senior union leader. Unfortunately, that same style is largely inconsistent with the Board's expectation that a witness clearly answer questions put to her and give testimony to the best of her ability. At many times during her testimony Ms. Dagg would not confirm as accurate what I consider to be reasonable and objective assertions of fact put to her by opposing counsel. Instead, Ms. Dagg typically rejected the proposition put to her based upon wafer-thin distinctions or semantic differences that were hard to appreciate on any objective basis. At yet other times, Ms. Dagg was unwilling to respond to the questions put to her by opposing counsel. In fact, Ms. Dagg expended considerable time and energy during her testimony not answering the questions that were put to her, instead using the question as an opportunity to communicate a position that she wanted the Board to hear. The end result was that her cross-examination was extended well beyond any reasonable length of time.

16. The General President of UNITE HERE at all relevant times for the purposes of these proceedings was Bruce Raynor, the former leader of the UNITE side of the union. As will become evident, the interests of Mr. Raynor were aligned with the interests of those individuals seeking to disaffiliate the UHOC from UNITE HERE. Mr. Raynor did not testify in these proceedings. UNITE HERE asserts in its written argument that the Board ought to draw a negative inference from the fact that he did not testify. Events upon which Mr. Raynor has knowledge and that are relevant to these proceedings were squarely in play. As a result, where a dispute arises regarding a question of fact upon which Mr. Raynor would have had testimony to offer to the Board, I am entitled to draw a negative inference from the failure on the part of the WUOC to call Mr. Raynor as a witness (see, for example, *Repla Limited*, [1990] OLRB Rep. December 1319, *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. September 1411, *Mondiale Development Ltd.*, 2007 CanLII 48624 (October 26, 2007), and *Hi-Tek Dev. Inc.*, 2009 CanLII 43082 (July 31, 2009)).

## III. Background Facts

17. On July 1, 1995 the International Ladies Garment Workers Union (the "ILGWU") and the Amalgamated Clothing and Textile Workers Union (the "ACTWU") merged to form the Union of Needletrades, Industrial and Textile Employees ("UNITE"). At that time, Mr. Raynor was the Executive Vice-President of the ACTWU. UNITE secured trade union status from the Board shortly after its formation (see *National Carpet Mills Inc., a division of National FibreTech Inc.*, Board File No. 1471-95-R, unreported decision dated August 22, 1995). Subsequently, a trade union known as the Union of Needletrades, Industrial and Textile Employees Ontario District Council merged with another entity (the Ontario Joint Council, also affiliated with UNITE) to become the UNITE Ontario Council.

18. On July 12, 2004, UNITE merged with the Hotel Employees and Restaurant Employees International Union ("HERE") to form UNITE HERE. The merger agreement was negotiated primarily by Mr. Raynor (who came from the "UNITE side" of the merger) and Mr. Wilhelm (who came from the "HERE side" of the merger) with the assistance of capable legal counsel. The merger agreement by its terms was intended to serve only as a mechanism for integrating the UNITE and HERE unions, and as a foundation for the UNITE HERE constitution, which was identified as the document governing the merged organization. In fact, by its terms the merger agreement expired and is expressly said to have no further legal force as at July 12, 2005, one year after the effective date of the merger.

19. There is no dispute that both UNITE and HERE entered into the 2004 merger with the best of intentions. The senior leadership in both UNITE and HERE believed that the merger would result in more effective organizing campaigns and increased representation in each union's traditional sectors (in textile and related industries, in the case of UNITE, and in hotels and restaurants, in the case of HERE), as well as in under-represented sectors of the economy. From the HERE perspective, the belief was that the two merged unions would have sufficient resources to compete with global companies in the hospitality industry, an industry that cannot be moved off-shore.

20. The UNITE HERE constitution in effect at all relevant times was a unique document. Many of the powers traditionally reserved to a single General President were to be exercised jointly by Mr. Raynor and by Mr. Wilhelm. For example, the power to grant, suspend or revoke a charter of any affiliate, or to place an affiliate under trusteeship or supervision, was to be exercised jointly by the two Presidents. There was a difference of opinion raised during the course of evidence regarding the underlying purpose of this unique structure. According to Ms. Dagg, the constitution reflected a consensus model. She is of the view that the two Presidents were expected to work together on almost every matter and were required to "agree on everything in order to move the union forward". Mr. Wilhelm, who was intimately involved in drafting the constitution, disagreed with the view expressed by Ms. Dagg. He testified that it was always hoped that the two Presidents would, in fact, agree on most things, but stated that the union's General Executive Board (the "GEB") was provided with the authority in the constitution to function as a review body, which authority included the power to resolve any disagreements that might arise between the two Presidents.

21. As will be outlined in more detail below, I agree with the view held by Mr. Wilhelm on this question. There is nothing in the UNITE HERE constitution that mandates the type of

consensus described by Ms. Dagg during her testimony. Although it may have been anticipated at the outset of the merger that the two Presidents would share the same views on most topics of significance, the UNITE HERE constitution was clearly drafted so as to provide for the possibility that such unanimity might not be achieved on all matters. In my view, the constitution did provide for a means of resolving situations in which the two Presidents disagreed as to the appropriate exercise of authority, namely by putting the question to a vote of the members of the union's GEB.

22. In Ontario, the merger of UNITE and HERE affected the UNITE Ontario Council and Local 75. On August 5, 2004, the UNITE Ontario Council and Local 75 entered into an agreement to merge their respective organizations in order to create the UHOC. The merger had an effective date of September 14, 2004. The merger agreement provided that all property of the parties, all rights, privileges and powers, and every other interest of each of them, including bargaining rights, would be transferred to and vested in the UHOC as they had been in the UNITE Ontario Council and Local 75 previously. Each local union in good standing of the Council was deemed to be a local union in good standing in the UHOC, as was Local 75, which maintained its status as a separate local union. In addition, the merger agreement provided that the UHOC would become the collective bargaining representative for each of its members. It was also agreed that the Director of the UNITE Ontario Council, Ms. Dagg, would serve as the Director of the UHOC for a four year term commencing on the effective date of the merger, and that Mr. Clifford would serve as the President of Local 75 for a similar four year term. As it developed, each was successful in maintaining his or her respective position four years later. On September 14, 2004, UNITE Ontario Council convened a special meeting of delegates and passed a motion to ratify the merger agreement between it and Local 75. Amendments were passed to the UNITE Ontario Council by-laws, and the name of the organization was changed to the UHOC.

23. The UHOC had an identity separate from UNITE HERE. The merger agreement between UNITE and HERE provided that the Presidents were to jointly issue new charters to all UNITE and HERE chartered bodies containing the date of their original chartering by UNITE or HERE, as the case may be. As commonly occurs with respect to "paperwork" of this nature, the issuance of these new charters never occurred. However, the merger agreement between UNITE and HERE provided that each chartered body of either UNITE or HERE was to retain its charter as of the date of its original issue and become, by virtue of the merger, a chartered body of UNITE HERE. Accordingly, the parties agreed that the UHOC was a chartered body of the International at all relevant times. The UHOC was composed of delegates that represented each affiliated local union. It had officers and directors who were elected from time-to-time in accordance with its by-laws. As noted above, the Director of the UHOC was Ms. Dagg. Previously Ms. Dagg was the Director of the UNITE Ontario Council and an Executive Vice-President of UNITE. Prior to that, she was the Director of the Union of Needletrades, Industrial and Textile Employees Ontario District Council. As a result of the UNITE HERE merger Ms. Dagg was named as one of the International's nine Executive Vice Presidents. She also became a member of the UNITE HERE Executive Committee and its GEB.

24. As time progressed from July, 2004, the former UNITE side leaders began to develop the view that the merger between UNITE and HERE was not succeeding on the international level. Nor did they view it as succeeding here in Ontario. As will become clear, ultimately the leadership of the International developed a split, largely (though not exclusively) based upon whether any given individual was a former UNITE leader or a former HERE leader.

25. In Ontario, serious disputes emerged between the UHOC and Local 75 as a result of the different approach each took to labour relations matters. There appears to be no dispute that as early as September, 2004, both Local 75 and the UHOC were already in conflict. The differences between the organizations extended to matters such as the most effective use of resources, the structuring of bargaining unit representation, and dealing with termination applications. Ms. Dagg testified that by early 2005 the two entities operated very distinct, separate organizations. The office they shared was effectively divided into two separate groups, each with its own staff. Staff paid through the International also worked in the office. According to Ms. Dagg, it became difficult to communicate or talk about issues and there were a number of altercations between staff in the respective organizations that resulted in a "very negative, difficult working environment" for the staff and leadership of the organizations. At one point in her testimony Ms. Dagg characterized the situation as one that resembled "armed camps", though she subsequently retreated from that assessment. At the very least, Ms. Dagg characterized the relationship between the UHOC and Local 75 as one that was "extremely frustrating, extremely difficult, [and] extremely distracting from what we were supposed to be trying to focus on".

26. During January, 2008 Local 75 commenced a campaign to disaffiliate itself from the UHOC. In broad terms, it was concerned that certain actions taken by Ms. Dagg and the UHOC were undermining its role. Local 75 circulated petitions in its hotel bargaining units across Toronto seeking membership support for the proposition that Local 75 be permitted to disaffiliate from UHOC. At or around that same time Mr. Clifford and Frank Piserchia, the Secretary Treasurer of Local 75, wrote to the two Presidents seeking to disaffiliate Local 75 from the UHOC. Local 75 delegates voted to disaffiliate from the UHOC in April, 2008.

27. The Presidents did not want Local 75 and the UHOC to go their separate ways. They and two other leaders of UNITE HERE worked with Local 75 and the UHOC in order to secure an agreement between the two entities that would avoid a public split and maintain Local 75 in the UHOC. By early May, 2008, such an agreement was reached and reduced to writing. Ms. Dagg, Mr. Clifford, and the two Presidents signed that agreement on behalf of the UHOC, Local 75 and the International, respectively. The agreement was structured so as to delineate certain rights and obligations of both the UHOC and Local 75, and provided Local 75 with sufficient autonomy and control over its staff. All appeared well on the surface. However, it is now evident that the agreement did not address a number of significant, underlying issues between the UHOC and Local 75. Over time the level of distrust and tension between the UHOC and Local 75 continued to grow.

## IV. Events of Fall 2008 to the end of February, 2009

28. Throughout 2008 the level of distrust and tension continued to grow in the United States as well. Disputes arose regarding accountability for the expenditure of union resources. In particular, the UNITE side of the merged union was troubled that the budget for organizing employees was increasing, but that the results of increasing that budget in the form of successful organizing campaigns were not materializing. These disputes created tension between the two Presidents, so much tension that a mediator was invited to (and did) work with them regarding their underlying differences. During the summer of 2008 a small committee composed of senior leaders equally representing both the UNITE side and the HERE side of the union was formed to participate in the ongoing mediation efforts. Ms. Dagg was a member of this committee, representing the UNITE side of the union. The mediator was unable to resolve the differences

between the two sides. The efforts to mediate a resolution ended in October or November, 2008 when (as Ms. Dagg put it) the committee "broke into open revolt" and "just blew apart" as a result of various resignations triggered by some very negative meetings. According to Ms. Dagg, the mediator advised the UNITE side that there was "no hope" for resolution and he recommended to the UNITE side that it end the merger and seek a "divorce" from the HERE side of the union.

29. Mr. Wilhelm testified that the first "shot across the bow" that foreshadowed the events to follow occurred in late November, 2008. During the week of American Thanksgiving he and Mr. Raynor met in Mr. Raynor's office in New York. The efforts by the third party mediator to bridge the gap between the UNITE side and the HERE side of the union had failed a few weeks earlier. During the course of that meeting, Mr. Raynor advised Mr. Wilhelm that he had decided to "go to war" against UNITE HERE. Mr. Wilhelm asked Mr. Raynor to explain what he meant by that, and Mr. Raynor responded by saying "well, you'll see". Counsel for the WUOC asserted that Mr. Wilhelm was mistaken in this recollection and vigorously cross-examined Mr. Wilhelm on this exchange with Mr. Raynor. Mr. Wilhelm weathered the cross-examination and credibly maintained his position. Mr. Raynor was not called by the WUOC to testify to the contrary. I draw a negative inference from his failure to testify and accept the testimony offered by Mr. Wilhelm. By November, 2008, the General President of UNITE HERE, the former leader of the UNITE side of the union, had signalled to Mr. Wilhelm that he would be going to war against the very union that he led.

30. That he surely did. Mr. Wilhelm testified that by the latter part of December, 2008 and into January, 2009, rumours began to circulate to the effect that some or all of the former UNITE trade union entities might seek to secede or disaffiliate from UNITE HERE. In early February, 2009, various senior leaders aligned with the UNITE side of the union, including Mr. Raynor, filed a number of lawsuits in the United States courts against UNITE HERE and certain of its leaders, including Mr. Wilhelm, seeking, amongst other things, court approval for the disaffiliation of UNITE side locals from UNITE HERE. The senior leaders of the UNITE side of the union intended to take with them the key assets of the union, including its two largest assets, the Amalgamated Bank of New York (UNITE HERE is its largest shareholder) and a large office building in Manhattan in which the union's head office is located. Mr. Wilhelm testified that at that time Mr. Raynor was the chairman of the Amalgamated Bank of New York and that as a result the union lost control of its accounts located in that bank.

31. Although Mr. Wilhelm was unaware of this at the time, it was subsequently discovered that during January, 2009, Mr. Raynor had privately retained on behalf of UNITE HERE an entity named The Organizing Group. The Organizing Group is a business operated by an American political consultant with known ties to the SEIU. The Organizing Group was retained by Mr. Raynor to provide consulting services (including phone calls, both live and robotic) and to produce various mailers that were directed to former HERE members of UNITE HERE. The consulting, mailer and robo-call services were provided to UNITE HERE during January and February, 2009. Mr. Wilhelm testified that the mailers started going out in February, 2009 and contained the message that "UNITE HERE isn't any good, get out of UNITE HERE, go to another union". Mr. Wilhelm testified that it was subsequently discovered that Mr. Raynor had privately approved payment from UNITE HERE funds for these mailers and phone calls. As Mr. Wilhelm put it in his evidence, "we were, in essence, paying the costs of attacking ourselves".

32. Ms. Dagg acknowledged during her cross-examination that she was aware that robo-calls designed by The Organizing Group were being made to members of Local 75 (amongst others), but stated that she was unaware of how they were being paid for. She viewed the calls as being indicative of the fact that the UNITE side and HERE side of the union were "at war". She also testified that similar steps were taken closer to home. Although she could not recall the exact time period within which this took place, Ms. Dagg knew that two members of her staff had distributed leaflets in downtown hotels to members of Local 75. Those leaflets were highly critical of Mr. Clifford and Local 75.

33. Mr. Clifford had a far clearer recollection of this incident. He testified that the distribution of these leaflets related to efforts by a rival union, the Canadian Hospitality and Entertainment Workers union ("CHEW"), to organize Local 75 properties during a statutory open period in the late fall of 2008. He understood Ms. Dagg and the UHOC to be behind the distribution of the leaflets, because he was aware that Ms. Dagg had met with Juan Perez, an employee of the Royal York hotel and the President of CHEW. Ms. Dagg acknowledged during her evidence that she had met with Mr. Perez at or around this same time to give him "advice" regarding dislodging Local 75 at local area hotels. She could not recollect in any detail the conversations she had had with Mr. Perez.

34. Given that Local 75 was a member of the UHOC directed by Ms. Dagg, and that Mr. Perez and CHEW were intent on challenging the bargaining rights held by Local 75 (or, at the very least, taking opportunities away from Local 75), one might think that meeting Mr. Perez and providing him with "advice" would be problematic for Ms. Dagg. Ms. Dagg testified that she did not consider it to be so. Ironically, earlier in 2008 when Local 75 was petitioning to leave the UHOC, Ms. Dagg terminated the employment of a group of UHOC staff who supported the position being taken by Local 75. Ms. Dagg stated that she terminated their employment because they were campaigning against the UHOC and attempting to divide it.

35. In her role as a member of the UNITE HERE Executive Committee, Ms. Dagg attended budget meetings in the United States on December 17 and 18, 2008 that she found to be extremely problematic. Budget proposals were put forward by Mr. Wilhelm at this meeting that the members of the Executive Committee with UNITE roots perceived to be unwise and/or politically motivated against the UNITE side of the union. For the very first time, formal votes cast by Executive Committee members at these meetings were cast on former "UNITE" and "HERE" partisan lines. As the "HERE side" of the union had a greater number of Executive Committee members, the motions were successful.

36. The testimony offered by Ms. Dagg regarding when the prospect of the UNITE side leaving the union was first discussed by former UNITE leaders was contradictory and unsatisfactory. Ms. Dagg testified on numerous occasions that it only became evident to senior leaders of the UNITE side after the budget meetings in December, 2008 that there was no way that the union could be kept together any longer, and that it was not until that time that talk started amongst those leaders, including her, about the prospect of leaving UNITE HERE. When pressed during her cross-examination, Ms. Dagg stated that her recollection was that the leaders of the UNITE side "did not discuss leaving the union until after December, 2008. Prior to that, it was talk – our discussions were how do we make the union work for us".

37. After the December, 2008 budget meetings, key senior leaders, officials and staff from the UNITE side of the union engaged in a series of two or three meetings in the United States over the course of the holiday season and into January, 2009 to discuss the various options available to them. Certain conference calls were also held. Mr. Raynor attended at these meetings and was included on these calls. During these meetings and conference calls the leadership of the UNITE side of the union discussed the possibility of leaving UNITE HERE. The impression left by Ms. Dagg was that the budget meetings in December, 2008 triggered the UNITE side leaders to first discuss potential disaffiliation from UNITE HERE.

38. It was suggested to Ms. Dagg during her cross-examination that she was, in fact, aware of discussions being held amongst UNITE-side leaders regarding disaffiliation that occurred well before December 17 and 18, 2008. Certain unidentified documents prepared before December, 2008 that described a plan on the part of the UNITE side to leave the union were put to Ms. Dagg. It was suggested that due to her senior role in the union, and in particular in the leadership of the UNITE side of the union, she must have been aware of these discussions and their substance.

39. Her answers to those questions were troubling, because they were often unresponsive to the underlying question, almost always tied to the actual language used in the documents referred to her rather than the merits or substance of the question. By way of example, when counsel for UNITE HERE asked Ms. Dagg to confirm that she did not know about these discussions taking place, she responded by saying that "they were not discussed in this kind of way", referring to the documents then in front of her. Later in his cross examination of Ms. Dagg, counsel for UNITE HERE asked Ms. Dagg if she had "any idea that these kinds of discussions were taking place … in November, 2008". She did not answer the question. Instead, she responded by stating that "This is not about me – what I understand this document outline is and what we had talked about in November was not leaving the union but what do we do in UNITE HERE". There are numerous other examples of similar non-responsive answers to the questions put to her by counsel for UNITE HERE on this issue.

40. There was, in fact, some evidence offered by Ms. Dagg that allows for the conclusion that discussion regarding potential disaffiliation had commenced amongst UNITE side leaders at least one month before the December budget meetings. It was put to Ms. Dagg during one portion of her cross-examination that the prospect of the UNITE side leaving UNITE HERE had been a topic of discussion during October or November, 2008. She testified in response to these questions that she did not recall anything happening in October, 2008, but instead recalled that steps had been taken later than that. Previously in her cross-examination, it had been put to Ms. Dagg that the decision on the part of the UNITE side leaders to seek a "divorce" from UNITE HERE had not been an overnight decision. She agreed with that proposition, noting that the disagreements between the sides had been intensifying for months. Notably, during that portion of her cross-examination, Ms. Dagg testified that "we were already thinking of that" when the mediator advised the UNITE side leaders that they should seek a divorce from the union. As noted above, the mediation failed, and the prospect of a divorce was raised by the mediator, in November, 2008 - a few weeks before American Thanksgiving, when Mr. Raynor first advised Mr. Wilhelm that he intended to "go to war" with UNITE HERE.

41. On the basis of this evidence, it is not difficult to find, as I do, that possible disaffiliation by the UNITE side of the union was a live discussion point with UNITE side leaders, including Ms. Dagg, well in advance of the December budget meetings. I make no finding at all

regarding Ms. Dagg's knowledge of any specific plans made by Mr. Raynor or other leaders of the UNITE side of the union in or before November, 2008 regarding the exit of UNITE side entities from the International. There is no evidence to suggest that Ms. Dagg had any such specific knowledge. However, I am satisfied that Ms. Dagg was well aware of discussions amongst the UNITE side leadership regarding a possible "divorce" of the HERE side of the union before the budget meetings that were held in December, 2008.

42. Ms. Dagg testified to a limited extent regarding the substance of the meetings held by the UNITE side regarding this possibility of a divorce in December, 2008 and January, 2009. Ms. Dagg acknowledged during her testimony that she participated fully at the highest levels of UNITE HERE and, before it, of UNITE, and that she played a significant role in leading the UHOC. She currently holds an even more responsible position at Workers United. Notwithstanding her senior roles and experience, and notwithstanding that she conceded that the meetings in December, 2008 and January, 2009 were important to her and to the UNITE side of the union, Ms. Dagg could not initially recall where and when those meetings took place, and had at best a vague recollection regarding the nature of the discussions engaged in at those meetings. Her recollection improved during her oral testimony before me, after she had considered the situation further. During these meetings, the topic of ending the UNITE HERE merger was discussed, amongst other options.

43. It is in this context that I return to what was going on here in Ontario. In or about January and February, 2009, Ms. Dagg met with the staff of the UHOC and with other leaders of UNITE HERE across Canada to discuss the options available to the UHOC. Although Ms. Dagg indicated that there were options other than disaffiliation raised at these meetings, she had considerable difficulty remembering many details of the other strategies discussed. In my view, it is unlikely that any option other than disaffiliation was discussed in any meaningful manner at any of these meetings.

44. A meeting of former Canadian UNITE affiliate leaders, some members of the UHOC Executive Board, and the UHOC staff was held on January 12 and 13, 2009 in Barrie, Ontario. Ms. Dagg testified that this meeting was an opportunity to bring people together to talk about what was going on in the union. She indicated during her examination-in-chief that "our plans to end the merger" – disaffiliating from UNITE HERE - were discussed at this meeting. There is a reference in the draft agendas and agenda for that meeting to a "100 Day Plan". The agenda sent to participants reflects that the "100 Day Plan" was an item that was discussed under the heading "Strategic Plan for 2009", and took up one-half of one day. Notwithstanding her role as a planner of this meeting and as a leader in attendance at it, Ms. Dagg testified under oath that she could not remember what the "100 Day Plan" referred to. I do not accept that testimony.

45. On January 20, 2009, Ms. Dagg called a meeting for February 3, 2009 of the Presidents of the more than 50 locals affiliated with the UHOC. Local 75 was not invited. Ms. Dagg testified that the purpose of that meeting was to ensure that all of the local presidents on the UNITE side of the union were made aware of the escalating conflict and the breakdown of the merger. Ms. Dagg testified that at that meeting various options were discussed, all of which had as an underlying goal the extraction of the UHOC from UNITE HERE. Subsequently, a leadership meeting with UNITE activists in the UHOC was held on February 13, 2009. What was going on in the union, and the desire of the UHOC to secede from UNITE HERE, was discussed

at the meeting. Ms. Dagg acknowledged that it is likely that possible affiliation with the SEIU was discussed at this meeting.

46. During her testimony Ms. Dagg played down her intention to lead the UHOC out of UNITE HERE, and the similar intention of the UHOC leadership at the time of these meetings. She testified, for example, that by the February 13, 2009 meeting the UHOC was "probably pretty close to figuring out what we were doing". As noted above, in my view Ms. Dagg had concluded well before that date that she would be leading the UHOC out of UNITE HERE. Even if I were to put to the side the fact that disaffiliating from UNITE HERE was a discussion point amongst the UNITE side leaders by November, 2008, it is clear that by the time of the January 12 and 13, 2009 meeting referred to above, Ms. Dagg and senior UNITE HERE employees were specifically discussing how to disaffiliate the UHOC from UNITE HERE.

47. Turning back to the situation in the United States, on January 31, 2009 or February 1, 2009, Mr. Wilhelm had lunch in Washington, D.C. with Andrew Stern, then the President of the SEIU. At the outset of the meal Mr. Stern handed Mr. Wilhelm a letter that reflected Mr. Stern's view that UNITE HERE had failed and that advised Mr. Wilhelm that the SEIU intended to affiliate some of the members and structures of UNITE HERE. Mr. Stern advised Mr. Wilhelm at that time that his union would "take anybody that Bruce Raynor could dynamite out of UNITE HERE" and that he thought that the rest of the union ought to join the SEIU as well.

48. In early February, 2009, correspondence with escalating levels of rhetoric authored by supporters of the two "sides" of UNITE HERE was exchanged in a fast and furious manner. On February 4, 2009, correspondence from GEB members affiliated with the HERE side, supporting the merger, criticizing Mr. Raynor, and urging unity, was circulated to senior UNITE HERE leaders. The next day, a memorandum authored by Ms. Dagg and three other UNITE side members of the GEB was circulated to leaders of UNITE HERE that took issue with the "preposterous" and "disingenuous" claims made in the memorandum circulated the previous day. Ms. Dagg's memorandum characterized the merger as "a failure", supported the efforts of Mr. Raynor, and stated that the "best course of action is to end this failed merger". The memorandum urged UNITE HERE leaders to take "steps to quickly dissolve the merger and get back to work".

49. On February 9, 2009, Ms. Dagg and a number of GEB members responded to correspondence issued by Mr. Wilhelm the prior day. The Wilhelm correspondence was not filed with the Board as an exhibit in these proceedings. In the memorandum dated February 9, 2009, Ms. Dagg and other GEB members state that the UNITE HERE merger had failed and that "viable options such as an affiliation with the SEIU can avert a civil war". The letter concluded that "we should terminate this merger in a responsible manner". Ms. Dagg testified that by this time the UNITE side of the union was "pursuing our strategy of trying to go our separate ways because we made the decision that it was irreparable between the two unions". As indicated above, the evidence establishes that that decision had been made by the senior leaders of the UNITE side many months earlier.

50. From mid-February, 2009 to the end of that month, Ms. Dagg co-ordinated an effort to secure petition evidence to support the proposition that the UHOC had broad membership support throughout the locals in Ontario for moving forward with disaffiliation. On Sunday, February 22, 2009, Ms. Dagg forwarded to various staff members and rank-and-file leaders a sample meeting

notice and agenda for use in holding meetings of the locals for the purpose of passing a resolution to support the disaffiliation of the UHOC, the local, and related organizations from UNITE HERE. Local leaders were advised how the meetings should be conducted, and staff were provided with a sample resolution supporting disaffiliation for use at the local membership meetings. That same day, a template petition document in support of disaffiliation was circulated by a worker from the Canadian national office of UNITE HERE to largely the same group. Also included in the materials to staff was a template letter for distribution to local members describing why their signatures on the petition were important, and a "common questions" document. Ms. Dagg confirmed in her second round of oral testimony that these latter documents were likely distributed to local leaders and members. These documents were circulated surreptitiously. Recipients were requested to ensure that copies were not left in the office. Ms. Dagg subsequently indicated in an e-mail to one of the local union leaders not to openly circulate the petition because "we don't want local 75 folks to know yet that we are working on this …".

51. As noted above, the petition documents were circulated by the UHOC to ensure that it had broad membership support in its locals for disaffiliation. Ms. Dagg testified that the petition acted as a supplement to the local membership meetings called to vote on the resolution to disaffiliate from UNITE HERE. The petitions were circulated by staff representatives and/or local union leaders. The UHOC established a goal of securing the signatures of 80 percent of its entire membership on the petition before March 16, 2009. Ms. Dagg testified that 79 percent of its membership ultimately signed by that date.

52. At the same time as these events were unfolding in Ontario, events of significance to the UHOC were occurring in the United States. A special meeting of the UNITE HERE GEB in Washington, D.C. had been called for Thursday, February 26, 2009, upon the written request of at least 16 members of the GEB. The meeting was called on short notice because it had come to the attention of UNITE HERE that certain joint boards in the United States had issued notices for meetings that reflected that they would be calling votes to secede from UNITE HERE in order to affiliate with the SEIU. The GEB was meeting for the purpose of determining what steps to take.

53. As a member of the GEB, Ms. Dagg had the right to attend this meeting. In fact, she did attend this meeting, as did thirty six other members of the GEB with HERE side roots. Ms. Dagg and others on the UNITE side of the union were of the view that the meeting had not been properly called, and that any business conducted at the meeting would be constitutionally invalid. As a result, early into the meeting Ms. Dagg went on record as participating in the meeting, but only in the role of an observer representing the UNITE side of the union. Mr. Wilhelm, who chaired the meeting, did not object to Ms. Dagg attending the meeting in that role. At one point during the course of the meeting Ms. Dagg sought to comment upon one of the resolutions. She was invited by Mr. Wilhelm to do so, but only if she were to alter her status from observer to member of the GEB, as observers do not have status to participate at these meetings. Ms. Dagg was not prepared to alter her status, and her comments were not permitted.

54. A number of resolutions were passed unanimously by the GEB at this meeting. The relevant motions (as amended at the meeting) for the purposes of these proceedings read as follows:

> **Resolution 2**
>
> Whereas a dispute has arisen between the Presidents as to whether to revoke the charter of any joint board, council or an equivalent body attempting to secede. The GEB resolves to revoke the charter of any affiliate upon its commencement of a vote to secede, to disaffiliate from UNITE HERE, or to affiliate with any other international union or labor organization. This is done without prejudice to any of the rights of the GEB to take further action. The subsequent filing of charges or other claims against individuals who take action to cause or foster secession or use affiliate funds in furtherance therefore or to any further action to revoke or suspend an affiliate's charter for other acts of secession.
>
> **Resolution 5**
>
> The Presidents have a dispute over whether a local union affiliated with a joint board, council or an equivalent body has a right to disaffiliate from the joint board, council or an equivalent body. Pursuant to the authority of the GEB in accordance with Article III, section 3 and Article III, section 6 of the constitution, the GEB finds that a local union has the right to disaffiliate from a joint board, council or an equivalent body.

As will become evident below, a "joint board" is defined in the UNITE HERE constitution to include a joint council such as the UHOC. Joint councils were a uniquely Canadian reference in the UNITE HERE constitution.

55. Immediately after the GEB meeting referred to above, Ms. Dagg distributed a memorandum to Vice Presidents, GEB members and affiliate leaders entitled "A Statement by Alex Dagg, Executive Vice President and Canadian Co-Director on Today's Meeting by the HERE Faction of the General Executive Board". Ms. Dagg testified that the purpose of the memorandum was to communicate to the union what had transpired at the GEB meeting held earlier that day. The memorandum stated that the meeting was not properly called and therefore was unconstitutional, and is critical of Mr. Wilhelm, the GEB members who attended at the meeting, and the lack of discussion or debate regarding the proposals made by Mr. Wilhelm. Ms. Dagg acknowledged attending the meeting for the sole purpose of observing it. However, a full one-half of the memorandum is dedicated to Ms. Dagg's assertion that in her role as a representative of the "entire Canadian membership" Mr. Wilhelm had "used the majority to rule me ineligible to speak". She asserted that Mr. Wilhelm had acted undemocratically in doing so, and stated that that incident "is just one more piece of evidence that this union is broken and cannot be fixed". The next day, Friday, February 27, 2009, Mr. Wilhelm issued a memorandum in response to that issued by Ms. Dagg, in which he asserted that the message sent by Ms. Dagg was "patently false" and "a lie". Ms. Dagg testified that she disagreed with Mr. Wilhelm's assessment of the situation.

56. The meeting of the UHOC delegates scheduled for Friday, February 27, 2009 was held in Toronto as scheduled. That meeting was attended by delegates representing all of the locals affiliated with the UHOC, including delegates representing Local 75. One of those delegates was Mr. Clifford. Ms. Dagg described the main topic of discussion at this meeting as the "vote on accepting the petition from Local 75 to leave the Ontario Council". There was at that time no current petition from Local 75 seeking disaffiliation. The reference by Ms. Dagg to the "petition"

was a reference to the petition forwarded to the two Presidents approximately one year earlier in which Local 75 had requested disaffiliation from the UHOC – a request that had been resolved by the May, 2008 agreement executed by Ms. Dagg, Mr. Clifford and the two Presidents.

57. At this meeting the UHOC delegates passed a resolution to approve the disaffiliation of Local 75 from the UHOC with immediate effect. The delegates who attended the meeting on behalf of Local 75 were not satisfied that the meeting had been properly called (they asserted that proper notice had not been provided by the UHOC to all of the Local 75 delegates) and they ultimately abstained from voting on the motion. Otherwise, all votes cast by delegates were cast in favour of the motion. The UHOC motion instructed Ms. Dagg to meet with Mr. Clifford to ensure an orderly transition of Local 75 out of the UHOC within 30 days. The Executive Board of Local 75 met shortly thereafter and passed its own motion authorizing Mr. Clifford to negotiate terms with Ms. Dagg.

58. Ms. Dagg sent an e-mail to Mr. Clifford on February 27, 2009 asking to meet to start discussions regarding an agreement to exit Local 75 from the UHOC, and from their shared premises. Shortly thereafter negotiations to reach such an agreement commenced through counsel. As will be explained in greater detail below, an agreement was subsequently reached between the UHOC and Local 75 to exit Local 75 from the UHOC, with retroactive effect to March 1, 2009.

## V. The Events of March, 2009

59. A number of significant events occurred during the first half of March, 2009. As noted above, immediately after the February 27, 2009 meeting of the UHOC, the UHOC and Local 75 commenced negotiations on a Memorandum of Agreement ("the March Agreement") permitting for the disaffiliation of Local 75 from the UHOC. After an initial meeting involving Mr. Clifford, Ms. Dagg and their respective union counsel, the March Agreement was negotiated through counsel.

60. The intention of the parties as expressed by the March Agreement, and its effect, was one of the most bitterly contested issues in these proceedings. During the course of these proceedings the parties stipulated as fact that the negotiations concerning the March Agreement were conducted exclusively between counsel, except for two brief meetings at which their clients were present. It was also stipulated that there were no proposals made by counsel for the UHOC of any kind that dealt with the disaffiliation of the UHOC from UNITE HERE, or what would happen to the bargaining rights held by the UHOC if disaffiliation were to be pursued. Mr. Clifford testified that at the first meeting held amongst clients and counsel it was expressly stated that he and counsel for Local 75 had no authority to act for the International. I accept that testimony.

61. On March 2, 2009, the General President of UNITE HERE, Mr. Raynor, forwarded correspondence to Ms. Dagg in response to the resolution approving the disaffiliation of Local 75 from the UHOC that passed on February 27, 2009. Much of the letter contains a recitation of Mr. Raynor's understanding of certain historical facts relating to the relationship between the UHOC and Local 75. In the penultimate paragraph of the letter, Mr. Raynor expresses his view that Local 75 should be disaffiliated from the UHOC in the manner set out in the resolution. The constitution of UNITE HERE required that both Presidents approve such a disaffiliation. On the basis of an assertion by Mr. Raynor that Mr. Wilhelm had "previously approved" the disaffiliation of Local

75 from the UHOC, Mr. Raynor advised Ms. Dagg that "Local 75 is hereby disaffiliated from the Ontario Council effective immediately". There is no evidence to suggest that Mr. Wilhelm had "previously approved" this disaffiliation as was asserted by Mr. Raynor. In fact, the evidence suggests quite the contrary, as it will be recalled that Mr. Wilhelm executed the agreement reached between the UHOC and Local 75 in May, 2008, maintaining Local 75 in the UHOC. Mr. Wilhelm could not recall previously approving disaffiliation by Local 75 from the UHOC. Mr. Raynor was not called as a witness by the WUOC. Accordingly, the basis for Mr. Raynor's assertion was not established.

62. Turning back to events unfolding in the United States, on March 3, 2009, two of the court cases that had been filed in early February, 2009 came on for hearing before Judge George Daniels of the United States District Court, Southern District of New York. The plaintiffs in those proceedings (individuals from the UNITE side, including Mr. Raynor) were seeking injunctive relief from the consequences of the resolutions adopted by the UNITE HERE GEB on February 26, 2009, referred to above. A number of joint boards had scheduled meetings for the weekend of March 7 and 8, 2009 in order to vote on disaffiliation from UNITE HERE. Because the wording of one of the resolutions of the GEB would result in revocation of the charter of the joint board "upon its commencement of a vote to secede, to disaffiliate from UNITE HERE, or to affiliate with any other international union or labor organization", the plaintiffs asserted that the voting would be conducted in the context of a penalty that was inconsistent with members' rights at law and that would chill their ability to consider the option of disaffiliation. The request for injunctive relief was withdrawn after counsel for Mr. Wilhelm and the other defendants gave an undertaking to the effect that the UNITE HERE GEB would not take any action to revoke the charter of any affiliate simply because a vote to disaffiliate from UNITE HERE had been called.

63. On March 5, 2009, Mr. Raynor sent by way of e-mail to all members of UNITE HERE a memorandum regarding "recent judicial decisions on disaffiliation votes by UNITE HERE locals and joint boards". Mr. Raynor noted in his e-mail memorandum that as a result of the above-referenced court hearing "the HERE faction agreed not to attempt to revoke the charters of Joint Boards that held votes". The next day, March 6, 2009, Mr. Wilhelm forwarded his own memorandum to all UNITE HERE members. He noted in this memorandum that UNITE HERE did agree that it would not revoke the charter of a joint board before a vote was held, but also noted that Judge Daniels had acknowledged that UNITE HERE was free to revoke the charter or file charges after a vote had been taken if a joint board actually voted to secede. Ms. Dagg could not recall whether she reviewed either memorandum when it circulated.

64. In fact, many of the joint boards in the United States did conduct disaffiliation votes over the weekend of March 7 and 8, 2009. Those joint boards voted to disaffiliate from UNITE HERE. There does not appear to be any dispute that by March 14, 2009 every joint board in the United States and every joint council in Canada had voted to leave UNITE HERE, with the exception of the UHOC.

65. A meeting of the UNITE HERE GEB had been called by Mr. Raynor for Friday, March 13, 2009. That meeting took place as scheduled. It was chaired by Mr. Raynor. Many of the GEB members who had UNITE roots had previously resigned from the GEB, or, like Ms. Dagg, were not present. Accordingly, the meeting was attended mostly by GEB members from the HERE side of the union. At this meeting certain resolutions were passed regarding the

votes previously taken by various joint boards (and one local union) to disaffiliate from UNITE HERE. The texts of the resolutions are important. The pertinent resolutions read as follows:

> **Resolution 1**
>
> Certain Joint Boards and Local 169 filed a lawsuit in the United States District Court in New York asking the court to order that they can secede from UNITE HERE. On February 17, 2009, I put their managers on notice, in writing, that this lawsuit and any other attempts at succession violated the Constitution and rendered their charters subject to revocation. The Joint Boards nevertheless have pursued the litigation and they and the Ontario Council scheduled and held votes of their delegates to secede from UNITE HERE. They report that their delegates voted to secede. Article 7, Section 6(b) of the UNITE HERE Constitution states that the Presidents may revoke the charter of any affiliate that has engaged in an act intended or having the effect of terminating its status as an affiliate of UNITE HERE. The lawsuit and the secession votes are unquestionably such acts, which also violate Article 7, Section 4(b) of the Constitution prohibiting the use of affiliate funds to assist secession. Article 21, Section 2(a) of the Constitution makes all of the property, books and records of an affiliate the property of UNITE HERE, retained by the affiliate only for so long as the affiliate holds a valid charter issued by UNITE HERE. Article 21, Section 2(b) prohibits any affiliate from diverting any of the property in its possession in violation of the Constitution. This section requires the International Union's Presidents to take all necessary steps to protect the Union's property, Article 21, Subsection (c) provides that when the charter of an affiliate is revoked or becomes invalid, then the charter, funds, property, and books and records held by or for the affiliate shall be immediately delivered to, and all rights thereto transferred to, UNITE HERE.
>
> These Joint Boards, Ontario Council and Local 169, and any other joint board or council similarly situated, have decided to secede from UNITE HERE. They don't want charters from UNITE HERE anymore. Accordingly, their charters have become invalid. We should also revoke the charters.
>
> **Resolution 4**
>
> Since the charters of these Joint Boards, Ontario Council and Local 168, and any other joint board or council similarly situated, have become invalid and have been revoked, these entities cease to exist. Therefore, all of the affiliation agreements between the Joint Boards and local unions are now nullities. The local unions that were formerly affiliated with the seceding Joint Boards and Ontario Council are now directly affiliated with UNITE HERE International Union.

The GEB voted at this meeting to revoke the UHOC charter. The resolution passed by the GEB stated that the UHOC ceased to exist. Ms. Dagg agreed in her testimony that as at March 13, 2009 the position held by Mr. Wilhelm regarding UHOC disaffiliation was that the UHOC was not constitutionally able to secede from UNITE HERE. This resolution was consistent with that position.

66. Later that same day, Mr. Raynor forwarded a memorandum to all members of UNITE HERE, characterizing the UNITE HERE GEB as a "kangaroo court" dominated by the "Wilhelm faction". He asserted that the resolutions passed at the meeting, including those seizing resources and revoking charters, were "unconstitutional" and that they "will not stand". There is no specific comment made by Mr. Raynor in the memorandum about the revocation of the UHOC charter. Ms. Dagg testified that in her view the GEB meeting held on March 13, 2009 was improperly held because the two Presidents did not agree to call the meeting.

67. Of course, as of March 13, 2009 the UHOC had *not* in fact voted to disaffiliate from UNITE HERE. Yet the GEB resolutions assert that it had. Mr. Wilhelm acknowledged during his testimony that he had included reference to the UHOC in the proposed resolutions as a result of a misunderstanding on his part that the UHOC had previously voted to disaffiliate. Both Mr. Clifford and Nick Worhaug, a Co-Director (along with Ms. Dagg) of the UNITE HERE Canadian Conference, were in attendance at this GEB meeting. Neither said anything on the record to note the errant inclusion of the UHOC in the resolutions. Because of the undertaking made by UNITE HERE to the United States District Court on March 3, 2009, Mr. Clifford was of the view that the UHOC charter would only be revoked upon a disaffiliation vote actually being taken by the UHOC. After speaking with UNITE HERE counsel present at the meeting he was satisfied that his view was correct.

68. Mr. Wilhelm adopted this same position during his testimony. He testified that because of the undertaking made to the court on March 3, 2009, the revocation of the UHOC charter had been suspended and had not in fact been revoked until the result of the voting of UHOC delegates was announced on March 16, 2009. The resolutions of the GEB do not make reference to any such suspension. Subsequent to the GEB meeting, the UHOC never received actual notice of the revocation of its charter. Nor was the UHOC given thirty days notice of the decision to revoke in order to respond to the allegations against it, as is required by the constitution. Mr. Wilhelm stated during his testimony that when the UHOC charter was revoked the UHOC ceased to exist for constitutional purposes. He testified that the resolution did not have the ability to "exterminate" or "wipe out" the UHOC.

69. Ms. Dagg learned of the GEB resolution revoking the UHOC charter late in the day on March 13, 2009 through a discussion she had with legal counsel. Shortly thereafter she received from counsel a copy of the resolutions passed by the GEB. Ms. Dagg immediately secured control of the UHOC offices and its records by arranging for a security guard to be present in order to limit access to the building.

70. Just prior to Mr. Wilhelm's attendance at the GEB meeting on March 13, 2009, he executed on behalf of the International an agreement ("the Presidents' Agreement") relating to the March Agreement. By March 13, 2009, the UHOC and Local 75 had almost finalized the terms of the March Agreement, the key provisions of which will be outlined in detail below. One of the recitals contained in the March Agreement indicates that "the Presidents of UNITE HERE have agreed to the disaffiliation of Local 75 from the Council". That agreement was evidenced by way of the Presidents' Agreement. The Presidents' Agreement contains the following three authorizations and/or confirmations by Mr. Raynor and Mr. Wilhelm:

> 1. The March 2009 Agreement is fully compliant with the UNITE HERE Constitution.

> 2. Local 75 is exempted from affiliation with the Council effective March 1, 2009 pursuant to Article 6, Section 2(a) of the Constitution.
>
> 3. Local 75 bargaining rights listed in Schedule A are reconfirmed and settled pursuant to Article 3, Section 3(a)(i) of the Constitution.

71. As noted above, Mr. Wilhelm signed his name to a copy of the Presidents' Agreement on Friday, March 13, 2009. He testified that he had in his possession at that time an unexecuted copy of the March Agreement that he understood to be the final, agreed-to draft. However, it appears that some changes were effected to the March Agreement early on Saturday, March 14, 2009. The evidence establishes that Mr. Raynor executed the Presidents' Agreement the next Monday, March 16, 2009. On March 17, 2009, Mr. Wilhelm re-signed the Presidents' Agreement, on the same document that contains Mr. Raynor's signature. Mr. Clifford testified that he asked Mr. Wilhelm to do so in order to ensure that both signatures would appear on the same page. Mr. Wilhelm concurred with that testimony.

72. The March Agreement was executed separately by Ms. Dagg, on behalf of the UHOC, and by Mr. Clifford, on behalf of Local 75, on Saturday, March 14, 2009. Both Ms. Dagg and Mr. Clifford were responsible for instructing counsel and were aware of its contents when they signed the document. The Executive Board of Local 75 approved the agreement no later than Monday, March 16, 2009, and the delegates to the UHOC approved the March Agreement at a delegates' meeting scheduled for that same day. The key text and terms of the March Agreement are as follows:

> Whereas UNITE HERE, Local 75 and the Council have agreed that the affiliation of Local 75 with the Council should be terminated effective March 1, 2009;
>
> And Whereas Local 75 and the Council wish to resolve all issues, as between themselves, relating to the disaffiliation of Local 75 from the Council;
>
> And Whereas the Presidents of UNITE HERE have agreed to the disaffiliation of Local 75 from the Council;
>
> And Whereas the Local 75 Executive Board and Ontario Council delegates will be requested to confirm their agreement with the terms of this Memorandum by no later than March 16, 2009;
>
> And Whereas the Council and Local 75 acknowledge that this Memorandum is strictly limited to its terms, constitutes no precedent for any other circumstances, and contains no admission of liability,
>
> Now therefore the parties agree as follows:
>
> 1. The Council and Local 75 have ended their affiliation effective March 1, 2009.
>
> 2. The Council confirms that Local 75 is presently the lawful exclusive bargaining agent for all employers listed on Schedule A ("Local 75 employers"). The Council agrees that it will further confirm this position

> should any challenge to that position be raised by any other union, employer or individual before any competent tribunal.
>
> 3. Local 75 confirms that the Council and/or the remaining affiliates of the Council are presently the lawful exclusive bargaining agent(s) for all other employers. Local 75 agrees that it will further confirm this position should any challenge to that position be raised by any other union, employer or individual before any competent tribunal.
>
> 4. The Council and Local 75 agree to send a letter in the form set out in Schedule B to all Local 75 employers forthwith. ....
>
> ...
>
> 13. The Council and Local 75 accept and agree to the disaffiliation of Local 75 from the Council effective March 1, 2009 and neither of them will challenge or otherwise support a challenge to the disaffiliation in any forum.
>
> ...
>
> 19. The Council and Local 75 agree that this Memorandum binds their successors and assigns.
>
> 20. The undersigned acknowledge that they have the capacity and authority to bind each of their respective principals.

There are other specific provisions of the MOA that were referred to by the parties during the course of argument. These will be outlined below as appropriate.

73. Mr. Clifford stated that Local 75 had had enough experiences with the UHOC and with Ms. Dagg that he had no trust as to how the UHOC would handle the bargaining rights previously secured by Local 75. He was concerned because the UHOC had created a lot of mischief in the past regarding those bargaining rights, and he felt that Local 75 was vulnerable. Accordingly, his foremost concern when negotiating the March Agreement was to "lock down" and secure the bargaining rights that Local 75 would be taking with it when it departed from the UHOC. Mr. Wilhelm confirmed that his understanding was that the overall purpose of the March Agreement was to "nail down Local 75's bargaining rights" in case a dispute arose regarding them.

74. According to Ms. Dagg, her intention and understanding when negotiating the March Agreement was to make it clear that the UHOC had its bargaining rights, and that Local 75 had its bargaining rights, such that both the UHOC and Local 75 "were free to go on and act separately and do our normal work as trade unions separate from each other". As will be outlined below in greater detail, Ms. Dagg testified that she was of the view that the bargaining rights of the UHOC and the right of the UHOC to disaffiliate from UNITE HERE were settled as a result of the March Agreement. UNITE HERE vehemently disagrees with that assessment, and states that the March Agreement does no such thing. There is no dispute that Ms. Dagg never communicated the above-referenced intention and understanding to Mr. Clifford – or to anyone else – until well after the execution of the March Agreement.

75. As noted above, the UHOC had scheduled a special meeting of its delegates for Monday, March 16, 2009. Notice of the meeting was sent to delegates of the UHOC well in

advance of the date of the meeting. That notice indicated on its face that the agenda of the meeting included a report of the status of UNITE HERE and the UHOC, and discussion and voting on proposed amendments to the by-laws of the UHOC that would delete all references to UNITE HERE, to disaffiliate from UNITE HERE, and to make the UHOC an independent trade union. Notice of this meeting was not sent to any delegates of the UHOC representing Local 75, because Local 75 had been disaffiliated from the UHOC on February 27, 2009. The evidence establishes that the UHOC attempted to keep secret from the leadership of Local 75 the date of this meeting and the agenda items for as long as it possibly could. Ms. Dagg acknowledged during her testimony that she did not tell anyone on the HERE side of the union about this meeting.

76. On Monday, March 16, 2009, the delegates of the UHOC convened and, as noted above, approved the March Agreement between it and Local 75. Those delegates also passed a resolution responding to the revocation of its charter by UNITE HERE and responding to the latter's assertion that the UHOC ceased to exist. Further, the UHOC delegates voted unanimously to disaffiliate from UNITE HERE and passed amendments to its by-laws such that the revised by-laws of the UHOC reflected that it was no longer affiliated with UNITE HERE. The two key resolutions passed by the UHOC for the purposes of these proceedings read as follows:

> **Resolution 1**
>
> WHEREAS the Ontario Council and its affiliates have represented working people in Ontario for decades;
>
> AND WHEREAS the Ontario Council does not owe its existence to UNITE HERE;
>
> AND WHEREAS the Ontario Council has ongoing legal and collective bargaining duties to its membership;
>
> AND WHEREAS, the General Executive Board of UNITE HERE has, without notice to the Ontario Council, purported to revoke the Charter of the Ontario Council;
>
> AND WHEREAS upon asserting that it had revoked the Ontario Council's Charter, the GEB also asserted that such revocation meant that the Ontario Council ceased to exist;
>
> AND WHEREAS the Ontario Council is the exclusive bargaining agent for thousands of members, in over one hundred bargaining units across Ontario, to whom the Ontario Council owes continuing statutory and legal duties;
>
> AND WHEREAS those bargaining rights continue to exist and be held by the Ontario Council, and those members continue to be and to wish to be represented by the Ontario Council in collective bargaining;
>
> AND WHEREAS the Ontario Council wishes to continue its existence as a trade union in Ontario and continue to represent its members;

> NOW THEREFORE BE IT RESOLVED THAT the Ontario Council continues its legal existence and continues to hold title to its assets and property;
>
> AND THEREFORE BE IT FURTHER RESOLVED THAT the Ontario Council authorize the Executive Board of the Council to take such steps as are necessary to protect the assets, property and bargaining rights of the Ontario Council so that the Ontario Council can continue to be an effective representative of its members and continue to discharge its statutory and other legal duties as a trade union in Ontario.
>
> **Resolution 2**
>
> WHEREAS the most important function of this Council is to represent its members;
>
> AND WHEREAS the Council represents thousands of members in Ontario in over one hundred bargaining units;
>
> AND WHEREAS the Council must carry out its obligation to negotiate collective agreements, handle bona fide grievances, support its members by ensuring that the members receive services and representation;
>
> AND WHEREAS the actions of the General Executive Board of UNITE HERE have threatened the ability of the Council to continue to provide those essential services;
>
> AND WHEREAS the bargaining rights, collective agreements and each individual members must be protected;
>
> THEREFORE BE IT RESOLVED that I move adoption of the attached proposed amendments to the by-laws of the Council;
>
> BE IT FURTHER RESOLVED that I move that this Council disaffiliate from UNITE HERE and restore democrary [sic] to our union.

Ms. Dagg testified that by voting in favour of Resolution 1 the delegates were attempting to ensure the continuing existence of the Ontario Council, since UNITE HERE had revoked its charter and had said that it no longer existed. The delegates also wanted to ensure that the Ontario Council held onto the bargaining rights of its affiliated locals.

77. Both motions passed unanimously. Upon the passage of these motions, the Chair of the meeting advised the delegates that the UHOC, now styled as the "Ontario Council", had disaffiliated from UNITE HERE. Ms. Dagg was appointed Director of the Ontario Council. A motion was passed by the delegates to join the new Workers United union which was having its founding meeting during the weekend of March 21 and 22, 2009, in Philadelphia, Pennsylvania. There was also discussion at the meeting regarding possible affiliation with the SEIU.

78. Late in the afternoon of March 16, 2009, Ms. Dagg forwarded to Messrs. Raynor and Wilhelm, by facsimile and by e-mail, correspondence confirming that the UHOC had voted that day to disaffiliate from UNITE HERE effective that same date, and advising them that she was resigning her membership in UNITE HERE and her position as an international officer of the

union. Amongst other things, Ms. Dagg states in this letter that as a consequence of the UHOC vote to disaffiliate "the Constitution of UNITE HERE ceased to apply to our union and we will not comply with it nor submit to any of your decisions or the decisions of the GEB". Ms. Dagg testified that this was a form letter prepared by someone on the UNITE side of the union based in the United States, but she confirmed that she meant what she had said in this letter. The evidence established that each senior leader in UNITE HERE had forwarded a copy of this letter to Messrs. Raynor and Wilhelm upon determining to resign from his or her office with the union.

79. A factual dispute that has relevance to the Board's determination regarding the purpose and effect of the March Agreement is whether Mr. Clifford was aware prior to March 16, 2009 that the UHOC intended to vote to disaffiliate from UNITE HERE at its meeting scheduled for that same date, and, if so, when he had first learned of that intention. Ms. Dagg stated in her testimony that she was of the view that Mr. Clifford was aware that the UHOC would vote to disaffiliate from UNITE HERE at the March 16, 2009 meeting well in advance of that meeting. She agreed that she did not advise Mr. Clifford or anyone from the HERE side of the union before the March 16, 2009 meeting that she intended to present a motion to disaffiliate the UHOC from UNITE HERE at that time. However, she asserts nonetheless that Mr. Clifford was aware of the intentions of the UHOC well before March 16, 2009.

80. As noted above, Mr. Clifford was in attendance at the February 26, 2009 meeting of the UNITE HERE GEB, and moved to specifically include the "joint council" concept within the text of the resolutions adopted at that meeting. By that time, Mr. Clifford was aware that all of the joint boards in the United States had indicated an intention to disaffiliate from UNITE HERE, and he agreed during cross-examination that he believed that the UHOC intended to disaffiliate as well. Mr. Clifford testified that he was just never entirely sure when the UHOC would attempt to leave.

81. It is evident that Mr. Clifford's understanding of the intention of the leadership of the UHOC developed over time. For at least two months prior to the end of February, 2009, Mr. Clifford had surreptitiously received information from two individuals who were privy to the decisions made by the leadership of the UHOC. In fact, information from various meetings held by Ms. Dagg had been relayed to Mr. Clifford as early as December 12, 2008. All of the e-mails, memoranda and notes kept by Mr. Clifford reflect discussion amongst senior officials affiliated with the HERE side of the union regarding a possible attempt by the UHOC to disaffiliate from UNITE HERE, and its potential timing.

82. The evidence establishes that by February 20, 2009, Mr. Clifford had become aware that a meeting of the UHOC delegates had been scheduled for February 27, 2009, and that a second special delegates meeting had been scheduled for March 16, 2009. In a memorandum dated February 20, 2009 addressed to various HERE side individuals, including Mr. Wilhelm, Mr. Clifford "guessed" as to what he believed the agendas for the two meetings would be. He indicated that he was not aware of the plan established by Ms. Dagg at that point. Disaffiliation from UNITE HERE was identified as a potential topic for the February 27, 2009 meeting of delegates.

83. On or shortly after February 23, 2009, Mr. Clifford forwarded a memorandum to Ms. Dagg regarding various concerns he had regarding the meeting of the UHOC scheduled for February 27, 2009. Amongst other things, Mr. Clifford asked Ms. Dagg to advise him whether the

purpose of the meeting was to disaffiliate from UNITE HERE. He advised Ms. Dagg that if disaffiliation was the purpose of the meeting, "it would be a violation of the Constitution of the International Union and By-Laws of the Council, with potential dire consequences". By way of memorandum dated February 25, 2009, Ms. Dagg advised Mr. Clifford that "as far as we are aware, there are no motions relating to disaffiliation of the Ontario Council from UNITE HERE" on the agenda of the February 27, 2009 meeting.

84. Later that same day Mr. Clifford wrote to senior members of the HERE side of the union and advised them that Ms. Dagg had confirmed with him that the agenda for the meeting did not include disaffiliation from UNITE HERE, but rather included issues relating to Local 75 and the UHOC. Ms. Dagg indicated in her testimony that the purpose of the meeting was to discuss the relationship between Local 75 and the other locals in the UHOC, and to terminate the affiliation of Local 75 with the UHOC. She did not tell Mr. Clifford that a motion to disaffiliate Local 75 from the UHOC was on the agenda because she felt she was not required to do so.

85. Shortly after the meeting of the UHOC held on February 27, 2009, Mr. Clifford secured documents that were handed out to delegates of the UHOC immediately after that meeting. These documents speak to the issue of the UHOC disaffiliating from UNITE HERE, and include a draft resolution. Mr. Clifford transmitted those documents to Mr. Wilhelm and to legal counsel. Mr. Clifford testified that by this time he "had a very good idea" that the March 16, 2009 meeting would be the date that the UHOC would vote to disaffiliate, and that that was the most likely scenario, but was not entirely sure because no one had told him. On Saturday, March 14, 2009, when Mr. Clifford signed the March Agreement, he knew that the UHOC was holding a delegates meeting on March 16, 2009 and he acknowledged that he had "every reason to believe" that they were going to disaffiliate, but had never been expressly advised of same.

86. The testimony offered by Ms. Dagg on the question of Mr. Clifford's knowledge of the UHOC intention was inherently contradictory. As noted earlier, by March 14, 2009 every joint board and joint council of UNITE HERE in North America had voted to disaffiliate from UNITE HERE, except for the UHOC. In that context, Ms. Dagg stated that because Mr. Clifford was aware of the UHOC loyalty to the UNITE side of the union, knew of the meeting of UHOC delegates scheduled for March 16, 2009, and shared an office with the UHOC, Mr. Clifford must have known well in advance of the meeting of March 16, 2009 what would happen at that meeting. Ms. Dagg relied upon the fact that the UHOC and Local 75 "worked in a close office" with "lots of overlap" and asserted that it was "commonly known what was going on by both sides" due to the shared office space, photocopy equipment and office staff. Ms. Dagg testified that "it was a fairly close operation so there was a lot of material that was flying around that both sides saw" and that "nothing much was secret in our office".

87. That testimony is wholly inconsistent with the assertion made by Ms. Dagg numerous times during her evidence that the UHOC and Local 75 operated separately and apart. I have identified some of her testimony earlier in this decision. In addition, Ms. Dagg testified that by March, 2009 there was "a war between the two sides", that the two entities "weren't communicating with each other", and were in fact "divided and separate" with their "own staffs and all that". Ms. Dagg testified that she and her staff at the UHOC acted carefully and discreetly when communicating amongst themselves regarding the substance of the March 16, 2009 meeting, so as to keep Mr. Clifford and Local 75 in the dark. She further testified that she had a practice of shredding personal notes and to-do lists because the UHOC shared an office with Local 75 and she

did not want them seen around the office. Accordingly, on the question of the nature of the relationship between Local 75 and the UHOC at its shared office, the testimony offered by Ms. Dagg was the individual equivalent of a steamship flying a flag of convenience. The office was either "close" or "divided and separate" – it cannot be both.

88. On balance, I conclude that Mr. Clifford likely anticipated before March 13, 2009 that the UHOC would be asking its delegates to vote on a disaffiliation motion on March 16, 2009. I do not doubt that no one from the UNITE side of the union actually told Mr. Clifford or any senior UNITE HERE official that a disaffiliation vote was a definite certainty for March 16, 2009. As a result, although it is clear that Mr. Clifford could not have guaranteed to anyone on March 13, 2009 that the UHOC would be taking such a vote on the following Monday, it is almost certainly the case that he anticipated that such a vote to disaffiliate would be taken that day. As Mr. Clifford himself pointed out, the signs were all there, the other joint boards and joint councils had all voted in favour of disaffiliation, and UNITE HERE was well aware of the loyalties held by Ms. Dagg.

89. I am not satisfied that other senior leaders of UNITE HERE had that same expectation. I have no evidence regarding the expectation of any senior leader other than that of Mr. Wilhelm. Mr. Wilhelm acknowledged that he was aware that the UHOC would almost certainly be voting to disaffiliate, but he did not acknowledge that he expected that vote to occur on March 16, 2009. Given what was going on in the United States, and given the ultimate wording of the March 13, 2009 GEB resolutions, I do not believe that Mr. Wilhelm had any active awareness of what was transpiring in Ontario at that time.

90. Turning back to the events of March, 2009, on or about March 20, 2009, Mr. Wilhelm sent correspondence to Ms. Dagg in which he asserts that she had been "led down the garden path". Mr. Wilhelm sent a similar letter to all of the UNITE side leaders who had delivered to him a letter similar in form to that delivered by Ms. Dagg. In this correspondence, Mr. Wilhelm sets out his views of the effect of the UNITE HERE constitution and the initial merger agreement between UNITE and HERE on the property held by a joint board or local union should either attempt to secede from UNITE HERE. He urges Ms. Dagg to reconsider her position. Notably, Mr. Wilhelm makes no reference in the letter to bargaining rights, and how they would be affected in the circumstances.

91. On March 21, 2009, the founding convention of Workers United took place in Philadelphia as scheduled. Ms. Dagg attended that convention and was elected Secretary-Treasurer of Workers United, the union's second highest office. She was also elected to be the Canadian Director of Workers United. Mr. Edgar Romney, a former GEB member of UNITE HERE, was elected President. The delegates authorized the Workers United General Executive Board to negotiate and enter into an affiliation agreement with the SEIU as soon as possible.

92. On March 22, 2009, the Executive Board of the Ontario Council met and voted to change its name to the WUOC in order to reflect its new affiliation with Workers United. In that regard, the Executive Board of the Ontario Council executed a Workers United Affiliation Agreement with an effective date of March 21, 2009. At a subsequent meeting of the WUOC on October 16, 2009, the delegates of the WUOC passed amendments to its by-laws confirming the change of name from the "Ontario Council" and its affiliation with Workers United.

93. At a meeting of the WUOC Executive Board held in Toronto on March 30, 2009, the Executive Board discussed affiliation with the SEIU and agreed to affiliate. The minutes of the above-referenced Executive Board meeting reflect that Workers United has a four-year agreement with the SEIU in which Workers United can disaffiliate from the SEIU at any time. This structure was confirmed by Ms. Dagg during her testimony, as was the fact that the WUOC has no such "opt-out" provision in its agreement with Workers United. Ms. Dagg confirmed during her testimony that these opt-out clauses provide trade unions with an opportunity to end a merger when it does not work out for any reason. The merger agreement between the ACTWU and the ILGWU that established UNITE on July 1, 1995 contained such an opt-out provision. Notably, the constitution of UNITE HERE does not contain such a provision. The undisputed testimony of Mr. Wilhelm, which I accept, was that during the negotiation of the merger agreement establishing UNITE HERE, Mr. Raynor vigorously (and successfully) argued against including such a provision, on the grounds that it lessened the focus of the merging parties on making the merger work.

94. The roles of Executive Board members and officers of the WUOC are filled by the same individuals who served similar roles with the UHOC. The WUOC employs the same staff as was employed by the UHOC, with the exception of those individuals who chose to become employed with Local 75 in March, 2009.

## VI. Events Relating to Tiercon, Owens Corning and Aramark during March, 2009

### *(a) Tiercon*

95. The employees at Tiercon are members of UNITE HERE Local 314. Members of Local 314 work at three separate locations, and are governed by the terms of two collective agreements that relate to those locations. Petitions were circulated in the workplace that stated that the persons signing supported the decision to leave UNITE HERE in order to form "a new stronger union". The petitions also stated that the signatories wanted the "Council and our Local Union to continue to represent us for the purposes of collective bargaining with our employer". Of the approximately 161 employees covered by the two relevant collective agreements, over 100 signed the petition. Ms. Dagg testified that due to layoffs in effect at the time that the petitions were circulated, only 75 to 80 people were actively working in the Tiercon bargaining unit.

96. Local 314 held three meetings to discuss and vote on disaffiliation. One was held at the Hamilton and District Labour Council Building on March 8, 2009. The second meeting, held that same date, occurred at the Holiday Inn in Oshawa. The third meeting was held at the Canadian Legion in Stoney Creek on March 14, 2009. Ms. Dagg believes that proper notice was given for these three meetings, but could not confirm whether it had been. Although the WUOC notes that all members in attendance at the meetings voted unanimously in favour of disaffiliating Local 75 from the UHOC, disaffiliating the UHOC from UNITE HERE, and disaffiliating Local 314 from UNITE HERE, Ms. Dagg conceded in cross-examination that she does not exactly know what motion or motions were actually voted upon at any of the three meetings, because the minutes of the meetings do not disclose the wording of the motion or motions voted upon. Of the 161 employees eligible to vote on the issue of disaffiliation, only 22 actually showed up to vote – a participation rate of 14 percent.

*(b) Owens Corning*

97. The employees at Owens Corning are members of UNITE HERE Local 1305. Members of that local signed a petition circulated in their workplace that was identical in substance to that signed by employees at Tiercon. Almost all of the approximately 171 employees covered by the collective agreement signed the petition.

98. Local 1305 held a meeting on Friday, March 13, 2009 at a local CAW hall in order to discuss and vote on disaffiliation. Three separate times to meet and to vote were provided. Again, like Tiercon, all members in attendance voted unanimously in favour of disaffiliating Local 75 from the UHOC, disaffiliating the UHOC from UNITE HERE, and disaffiliating Local 1305 from UNITE HERE. Of the 171 employees eligible to vote on the issue of disaffiliation, only 17 actually showed up to vote – a participation rate of 10 percent.

*(c) Aramark*

99. The employees at Aramark are members of UNITE HERE Local 2742. Members of that local signed a petition that was circulated in the workplace that was identical in substance to that signed by employees at Tiercon and Owens Corning. The petition was signed by approximately 75 of the approximately 549 employees covered by the collective agreement.

100. The Executive Board of that local held a special meeting on Sunday, March 8, 2009, at the Steelworkers' Hall on Cecil Street in Toronto. Ms. Dagg attended at this meeting. She testified that notice of that meeting "should have been posted in all of the workplaces where workers are in Local 2742". Again, like Owens Corning, all members in attendance voted unanimously in favour of disaffiliating Local 75 from the UHOC, disaffiliating the UHOC from UNITE HERE, and disaffiliating Local 2742 from UNITE HERE. However, of the 549 employees eligible to vote on disaffiliation, only 19 actually showed up to vote – a participation rate of only 3.5 percent. Ms. Dagg conceded in her testimony that this turnout was "not particularly good".

101. Aramark and representatives of the WUOC bargained a renewal collective agreement that was ratified by the members of the local on April 20, 2009. The ratification vote was taken before UNITE HERE had provided any indication to the WUOC that a question might exist as to whether the WUOC had the authority to bargain on behalf of the employees in the bargaining unit. However, it appears that the question of the status of the WUOC as a trade union was not entirely absent from the minds of the parties. The Memorandum of Settlement dated April 15, 2009 between the WUOC and Aramark specifically states, in paragraph 1, that the WUOC and its Local 2742 had advised Aramark "that it is UNITE HERE Ontario Council renamed", and that the parties agree that the union should be identified as such in the collective agreement "subject only to resolving the issue of the Union's status".

*(d) Tiercon, Owens Corning and Aramark*

102. Shortly after her return to Canada from the founding meeting of Workers United on March 21, 2009, Ms. Dagg forwarded correspondence to each employer for which the UHOC had bargained on behalf of its members. The letter forwarded to each of Aramark, Tiercon and Owens Corning was dated March 23, 2009, and advised the addressee that effective March 21, 2009,

"UNITE HERE Ontario Council is now known as Workers United Ontario Council, affiliated with Service Employees International Union". It requested that dues remittances and correspondence be addressed accordingly, and forwarded to the union's offices which remained the same as before.

### *(e) Local Union Meetings Generally*

103. Ms. Dagg testified that the turnout at the local meetings across the province varied from local to local. She attended only five or six of the local meetings. However, she testified that staff or board members of the UHOC attended the other local meetings, and that she received regular reports as to how the meetings were progressing. Ms. Dagg testified that she understood that in some of the units, where the meeting was held right at the workplace, the turnout was as high as 99 percent of the unit's membership. According to Ms. Dagg, no local voted against disaffiliation, and no member in any of the locals actually voted against disaffiliation – although there were "a small number" of members who chose to abstain from voting. No employee of Tiercon, Owens Corning or Aramark has complained to the Board of any deficiency in the process utilized by the UHOC.

## VII. Events from late March, 2009 to May, 2009

104. At some point during the week commencing March 23, 2009, correspondence on the letterhead of the UHOC backdated to March 16, 2009 and signed by Ms. Dagg (in her previous capacity as the Director of the UHOC) and by Mr. Clifford (in his capacity as President, Local 75) was forwarded to all employers bound to collective agreements with Local 75. That correspondence confirmed that the bargaining agent for the employees of the employer continued to be UNITE HERE Local 75. This was the letter that paragraph 4 of the March Agreement mandated be sent to all Local 75 employers.

105. From late March, 2009 until the early part of May, 2009 there was a period of unusual calm. UNITE HERE sent nothing to Ms. Dagg or to the WUOC indicating its position with respect to the existence of the WUOC or the bargaining rights claimed by the WUOC. The letters sent by Ms. Dagg to employers such as those sent to Aramark, Tiercon and Owens Corning were not the subject of a response by UNITE HERE. From March 17, 2009 the WUOC continued to function on a day-to-day basis as the bargaining representative of the individuals it previously represented. Representatives of the WUOC and Local 75 worked to ensure that the terms of the March Agreement were, to some extent at least, complied with.

106. This period of calm ended on or about May 4, 2009. At or around that time, counsel for UNITE HERE, Mr. Hayes, forwarded correspondence to each employer that had previously dealt with the UHOC, including Tiercon, Aramark and Owens Corning, enclosing a memorandum from Mr. Wilhelm that set out the position of UNITE HERE. Mr. Wilhelm testified that he decided to send the memorandum in April, 2009 after seeking legal advice and speaking with Mr. Clifford and Mr. Worhaug. He acknowledged that it took him some time to act but observed that "there was an awful lot going on in the period of time, to put it mildly".

107. The memorandum from Mr. Wilhelm, dated May 3, 2009, states that any assertion by the WUOC that it is one and the same union as the former UHOC is false. The memorandum further states that UNITE HERE had not agreed to the secession of the UHOC, that that secession

had violated the provisions of the UNITE HERE constitution, and that litigation was underway to enforce the constitution and the fiduciary obligations of individual officers and representatives of the union. Mr. Wilhelm asserted that the addressee company's bargaining relationship remained with UNITE HERE, and recommended that any dues and other remittances be placed into an escrow account pending legal steps that UNITE HERE would be taking in the immediate future.

108. On or about that same day, Ms. Dagg forwarded correspondence to the relevant employers disputing the assertions made by Mr. Wilhelm in his memorandum. She asserted in her letter that the members of the UHOC had voted to disaffiliate from UNITE HERE and to affiliate with Workers United, and that the end result of all of those steps was a change in name, and nothing else. She asked the recipient company to ignore any communications from UNITE HERE and to continue its relationship with the WUOC. That same week, Ms. Dagg was served with a statement of claim issued by UNITE HERE, litigation that has since been settled.

109. More correspondence followed. Larry Steinberg from the law firm Koskie Minsky LLP was retained by Mr. Raynor on behalf of UNITE HERE. Near the end of the first week of May, 2009, Mr. Steinberg wrote to each employer that had previously dealt with the UHOC to advise that the correspondence received from Mr. Hayes enclosing the memorandum from Mr. Wilhelm was unauthorized because Mr. Raynor had not approved the retainer in question. Mr. Steinberg further advised that the views of Mr. Wilhelm reflected by the memorandum did not represent the views of UNITE HERE. Mr. Steinberg asserts in his letter that both Mr. Raynor and Mr. Wilhelm had approved a disaffiliation agreement between the UHOC and Local 75 "in which it was confirmed that bargaining rights for your company would remain with the Ontario Council (now known as Workers United Ontario Council)".

110. On May 7, 2009, Ms. Dagg forwarded to Messrs. Raynor and Wilhelm correspondence notifying them that all of the local unions in the UHOC had disaffiliated from UNITE HERE, effective as of the date of the local meetings held previously that year. Ms. Dagg attached to her correspondence a list of the locals and the date upon which the membership meeting for each local that had disaffiliated from UNITE HERE had been held. Ms. Dagg advised both Mr. Raynor and Mr. Wilhelm that since those dates "the Constitution of UNITE HERE has not applied to any of these local unions and they will not comply with it nor submit to any of your decisions or the decisions of the UNITE HERE General Executive Board". Furthermore, she advised Messrs. Raynor and Wilhelm that the leaders of the local unions and their members "are no longer members of UNITE HERE". Ms. Dagg agreed during her testimony that none of the local unions had received the prior consent of the GEB to disaffiliate from the International.

111. Mr. Steinberg authored further correspondence dated May 19, 2009, this time addressed to employers represented by Local 75. That correspondence enclosed a memorandum authored by Mr. Raynor. In that memorandum, Mr. Raynor asserted that actions taken by Mr. Wilhelm and supported by Local 75 had put the continued validity of the March Agreement in jeopardy, including the direction that Local 75 continue to be the bargaining agent for the employers identified in the March Agreement. Mr. Raynor asserted that the effect of invalidation of the March Agreement would be that dues and remittances would no longer be paid to Local 75. He recommended that each Local 75 employer put dues and other remittances into an interest-bearing escrow account. Mr. Clifford testified that this was the exact thing that he had intended the March Agreement to avoid. Despite maintaining the position of General President of UNITE

HERE, Mr. Raynor was now openly supporting the position taken by the WUOC over the position taken by his union's own affiliate, Local 75.

112. Ultimately, Mr. Raynor resigned his position as General President of UNITE HERE on May 29, 2009, the day before an internal disciplinary hearing scheduled by the GEB into his activities. Shortly thereafter, at the next scheduled meeting of the Workers United General Executive Board, Mr. Raynor was appointed the President of Workers United. Ms. Dagg agreed during her testimony that she understood before Mr. Raynor resigned from UNITE HERE that he would be appointed to the Presidency of Workers United. At the time that Mr. Raynor was made President, Mr. Romney was appointed to the role of Secretary-Treasurer, and Ms. Dagg was likewise appointed to the role of Executive Vice-President.

113. On that very same day, May 29, 2009, Mr. Steinberg again wrote to employers with Local 75 bargaining units, enclosing a memorandum from Ms. Dagg. In this memorandum, Ms. Dagg also urges the employers represented by Local 75 to put their union dues into escrow. With respect to the situation in Ontario, Ms. Dagg made the following observations:

> Insofar as bargaining rights in Ontario and hence entitlement to union dues are concerned, the dispute concerns the continuing validity of a disaffiliation agreement reached between UNITE HERE Local 75 ("Local 75") and UNITE HERE Ontario Council (which is now known as Workers United Ontario Council) ("the Council") whereby Local 75 disaffiliated from the Council. Since most bargaining rights were in the name of the Council (or the Council and a Local union) it was agreed that bargaining rights for certain employers would go to Local 75 and certain bargaining rights would remain with the Council.
>
> Due to the position taken by some parties to the dispute the validity of the agreement and therefore the identity of the bargaining agent for your establishment cannot be considered to be subject to a final agreement. If the agreement is no longer valid it may be that the Council and not Local 75 is the bargaining agent and therefore entitled to the dues.
>
> Accordingly, the earlier advice given to you from Bruce Raynor to place the dues in escrow pending the outcome of the litigation that will resolve the issue is still valid and is a prudent course of action in order to avoid any possible liability on your part.

Ms. Dagg testified in July, 2010 that the WUOC makes no claim to the bargaining rights held by Local 75 with respect to the properties listed in Schedule A to the March Agreement.

114. In early June, 2009, Nick Worhaug, by that time the Canadian Director of UNITE HERE, wrote to counsel for Aramark regarding its situation. He stated in his letter that the UHOC decision to disaffiliate from the International was prohibited by the UNITE HERE constitution. He also advised Aramark that the charter of the UHOC had been revoked, and that all property and bargaining rights of the UHOC had reverted to the International. Mr. Worhaug stated that the International was aware that Workers United or the WUOC had bargained with Aramark and that it had purported to reach a collective agreement relating to the University of Toronto campus. Mr. Worhaug advised Aramark that Workers United and the WUOC had "no connection whatsoever with UNITE HERE nor are they legitimate successors to any affiliates of UNITE HERE". Finally,

Mr. Worhaug asked that the recipient of the letter consider it to be notice to bargain pursuant to section 16 of the Act.

115. The response from Aramark was to acknowledge the dispute between the WUOC and UNITE HERE, to advise that it would not sign any collective agreement until that dispute was resolved, and to advise that it would, however, abide by the terms of the ratified Memorandum of Settlement reached on April 15, 2009. Aramark also indicated that it would not be commencing negotiations with anyone until a legally binding order compelled it to do so.

### VIII. Subsequent Events

116. Since the flurry of correspondence in May and early June, 2009, UNITE HERE has not taken any meaningful steps to maintain its presence in the province of Ontario, with the exception of Local 75, which has continued to fulfill its former role. During the course of his testimony Mr. Wilhelm suggested that Local 75 was sufficiently "robust" that it could step in to represent the employees currently represented by the WUOC. He testified that the union would consult with the locals that were part of the UHOC and with the members themselves and listen to what they think ought to be done. He indicated that if the members in the locals wanted to be part of the Workers United or the SEIU, the International would be open to that. Similarly, Mr. Clifford stated his view that in Ontario Local 75 had a "hefty" organization. He testified initially that he believed there to be growing support for UNITE HERE amongst former locals of the UHOC. He also thought that UNITE HERE could work with the staff of the WUOC in order to support any local union or bargaining unit that is ultimately found to be part of UNITE HERE. During his second round of oral testimony, Mr. Clifford testified that he thought working with WUOC staff was less likely now because of "poison and propaganda" that had been perpetuated by the WUOC staff. Mr. Clifford conceded that since the Ontario merger in September, 2004 he had not attended bargaining conducted by the UHOC for any of its local unions, and that neither he nor any representative of Local 75 had attended any UHOC local meeting or represented any UHOC local member other than one represented by Local 75.

117. The UHOC has not been placed into trusteeship by the International. Neither Ms. Dagg nor other member of the UHOC Executive Board was ever charged under the UNITE HERE constitution. The local unions affiliated with the UHOC have not made any per capita payments to UNITE HERE since March 16, 2009. Those same local unions have not been put into trusteeship, nor have the leaders of those locals been charged under the UNITE HERE constitution. Mr. Clifford stated that on a practical level he did not consider the local leaders to be the primary actors in what occurred, and that he saw no purpose in making enemies of them. The local unions were not invited to the International convention that was held in July, 2009. Those same local unions were not invited to send delegates to the telephone proxy election of Mr. Clifford as an Executive Vice-President of UNITE HERE in the fall of 2009.

118. In addition, UNITE HERE has not sent correspondence to the locals or to any members of any local to the effect that it claims to be the members' exclusive bargaining representative or that the local union remains directly affiliated with UNITE HERE. The testimony of Mr. Wilhelm suggested that the International did not have address information for the local unions and their membership. Mr. Wilhelm testified that at the time that the UNITE side entities purported to disaffiliate from the International, Mr. Raynor and his supporters stole the

UNITE HERE database and hired a company to scrub all of the computers clean, including all of the records of the International.

119. I accept the testimony of Mr. Wilhelm that the UNITE HERE records were erased by a company retained by Mr. Raynor. That evidence is not contradicted. However, I do not accept his testimony that the International had no means of contacting the local unions. Local 75 maintained membership lists and employer information relating to the UHOC after Local 75 disaffiliated from the UHOC. The March Agreement required that membership lists be returned to the UHOC by Local 75. They were not. Mr. Clifford took the position that since the charter of the UHOC had been revoked, and the UHOC no longer existed, he was no longer obliged to do so. In fact, both Mr. Wilhelm and Mr. Clifford acknowledged in their testimony that membership lists, including the home addresses of members, were given to other trade unions (in particular, to CUPE, and likely as well to the UFCW) in order to allow those trade unions to raid the very same units that they assert are its units. The evidence establishes that CUPE in fact used these lists to raid two bargaining units previously represented by the UHOC during their open periods.

120. Since the passing of the resolution to disaffiliate from UNITE HERE on March 16, 2009, the Ontario Council, and then the WUOC, continue to perform the functions previously performed by the UHOC, with the same staff (except, as noted earlier, for those staff who chose employment with Local 75). The WUOC provides the local union members with representation in all aspects of their employment relationship with their employers. It processes grievances on behalf of its members, bargains collective agreements, and represents employees on workplace safety and insurance matters and before other employment-related tribunals. It represents employees at arbitrations, but has secured the consent of counsel for UNITE HERE to do so. None of the local unions is operating as a UNITE HERE local union. Instead, they operate as Workers United local unions. Ms. Dagg testified that since March 16, 2009 many employers with UHOC relationships have placed union dues into escrow accounts. Some have refused to process grievances, some have denied access to staff to permit members to be serviced, and the WUOC has not been able to file for conciliation or to have conciliation officers appointed by the Ministry of Labour.

121. As at the time that Ms. Dagg testified in July, 2010, the WUOC had filed with the Board 36 different displacement applications for certification in the bargaining units previously identified as locals of the UHOC. Of those 36 applications, 34 had been voted by the Board, and the WUOC were successful in 31 and unsuccessful in three. There were certain challenges in some of those proceedings that had not been determined by the Board as at the time of Ms. Dagg's testimony. The WUOC asserts that it is the incumbent union in these displacement applications, such that even if it is unsuccessful in the representation vote, it ought to remain the bargaining agent for the local in question.

122. Ms. Dagg conceded during her cross-examination that in a number of the workplaces in which the WUOC represents employees there is some support for UNITE HERE. This is reflected by the results of the representation votes identified above. Ms. Dagg acknowledged that in certain workplaces petitions had circulated or were circulating in which the proponents desired representation by UNITE HERE. She characterized the level of such activity as "insignificant".

123. Since March, 2009, UNITE HERE has made limited efforts to assert bargaining rights in other Canadian provinces. Before March, 2009, UNITE HERE had a presence in Ontario,

Manitoba, British Columbia, Saskatchewan and Quebec. UNITE HERE has only made a claim for bargaining rights in this province and, shortly before the second round of oral testimony of Ms. Dagg, in Saskatchewan. Mr. Wilhelm testified that those bargaining rights are not as significant as the rights here in Ontario, and that many of the bargaining units in other provinces relate to "sunset industries". He also indicated that as a result of the actions undertaken by Mr. Raynor, the resources available to UNITE HERE were limited. As a result, the union was making "priority decisions about the allocation of legal resources and organizational resources on the ground". As noted earlier, the WUOC asserts that the only reason that UNITE HERE is pursuing these proceedings is that it hopes to "take out" Ms. Dagg. It asserts that the International has no desire to actually represent the members of the WUOC. Both Mr. Wilhelm and Mr. Clifford denied that assertion. The WUOC states that one consequence of not finding in its favour in these proceedings is that a representational vacuum would be created for the affected employees, completely ignoring their stated wishes and "the on-the-ground and practical labour relations realities across North America".

124. Finally, Ms. Dagg acknowledged during her testimony that funds of the UHOC were expended in support of its quest to disaffiliate itself from the International.

## IX. Key Provisions of the UNITE HERE Constitution

125. The provisions of the UNITE HERE constitution are critical to the determination of the question in dispute. The significant provisions of the constitution provide as follows:

> **Article 1 CONSTITUTION, JURISDICTION, OBJECTIVES**
>
> **Section 2 Definitions**
>
> (a) "GEB" means the General Executive Board of UNITE HERE;
>
> (b) "Presidents" means the General President and the President/Hospitality of UNITE HERE;
>
> (c) "local" means a local union of UNITE HERE;
>
> (e) "affiliate" means a local union, joint board, joint council (in Canada) or any other subordinate body affiliated with UNITE HERE.
>
> **Section 3 Official Constitution; Constitution and By-laws of Affiliates**
>
> (a) This document is the official Constitution of UNITE HERE. Affiliates may adopt constitutions and/or by-laws not inconsistent with this Constitution. Constitutions or by-laws of local unions may not be inconsistent with the provisions of the constitution or by-laws of a joint board with which they are affiliated. In any conflict between the provisions of the governing documents of a superior body and those of a subordinate body, the governing documents of the superior body shall prevail.

## Article 3 INTERNATIONAL OFFICERS

### Section 1 International Officers

(a) The international officers of UNITE HERE are the General President, the President/Hospitality Industry, the Executive Vice-Presidents, the Canadian Directors and the International Vice-Presidents. When they share authority, the General President and the President/Hospitality Industry are referred to in this Constitution as the Presidents. …

(b) **General Executive Board**: The GEB shall consist of all the international officers.

(c) **Executive Committee**: The General President, the President/Hospitality Industry, the Executive Vice Presidents and the Canadian Directors shall together constitute the Executive Committee of the GEB. The Executive Committee shall have the rights and powers conferred upon it by this Constitution and is authorized to act on behalf of the GEB between meetings of the GEB. It shall give prompt notice to the GEB of acts performed on its behalf.

### Section 3 Authority of Presidents

The Presidents shall have full power to direct the affairs of UNITE HERE, subject to review by the GEB. The Presidents may delegate any of the powers and duties of their offices under this Constitution. The Presidents shall determine any and all questions as to the application, interpretation or construction of this Constitution, or parliamentary procedure or laws, or rules of order, provided that the GEB shall resolve any disagreement between them.

### (a) Joint Duties and Rights of the Presidents

The Presidents shall jointly have the right to:

(i) decide all questions involving the jurisdiction of UNITE HERE and its affiliates; …

(vi) set and approve the annual budget for the International Union;

(ix) employ or retain any other personnel including professional advisors required to administer the affairs of UNITE HERE;

(xii) suspend officers, elected business agents or other employees of affiliates of UNITE HERE, for financial irregularities or for any other legitimate reason, with or without pay, pending hearing of the charges under this Constitution or the constitution or bylaws of the affiliate;

(xvi) grant, suspend or revoke the charter of any affiliate;

(xvii) as provided in Article 4, place an affiliate under trusteeship or under supervision. …

### Section 6 Duties and Powers of General Executive Board

(a) Regular meetings of the GEB shall be held at least two times a year. Upon written request of 16 Vice Presidents, the Presidents shall call a special meeting of the GEB. A majority of its members shall constitute a quorum. …

(c) The GEB shall have general supervisory powers over all the affairs of UNITE HERE and its affiliates, including but not limited to the right to:

> (i) determine all questions involving the interpretation of this Constitution in the event of a disagreement between the Presidents; …
>
> (iii) reprimand, discipline or reorganize any affiliate which has been found guilty of failing to comply with this Constitution or with policies or decisions adopted by a convention, or by the GEB, or of other misconduct; …

(f) The GEB shall exercise all of the other powers given to it under … Article 3 Section 3(a); Article 3 Section 3(a)(viii); Article 3, Section 6; … of this Constitution.

### Article 4 TRUSTEESHIP

### Section 1 Authority of the Presidents.

(a) Whenever, in the opinion of the Presidents, an affiliate or any of its officers has been guilty of violating the terms of this Constitution, or a lawful order of the GEB, the Convention body or one of the Presidents, or whenever any such affiliate or its officers, in the opinion of the Presidents, conducts the affairs of such affiliate contrary to the interest of such affiliate or of UNITE HERE, so as to constitute a threat to the welfare of any of the said affiliates, or in a grossly incompetent manner, or where an emergency exists, or when in the opinion of the Presidents, a trusteeship is necessary for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out legitimate objects, the Presidents may order a Trustee who is a member in good standing of UNITE HERE to take charge and control of the affairs and property of such affiliate.

### Article 5 LOCAL UNIONS

### Section 3 Rights and Duties

(a) A local shall carry out the objectives, policies and decisions of UNITE HERE. A local shall organize workers, negotiate and enter into collective bargaining agreements with employers in its jurisdiction, enforce such agreements and represent workers in the adjustment and settlement of justified grievances against employers except to the extent that UNITE HERE, or an affiliate of which the local is a part, is charged with any of such responsibilities.

### Section 7 Dissolution, Withdrawal or Merger of Local

A local may not withdraw from UNITE HERE, go out of existence, dissolve or join or amalgamate with a non-UNITE HERE union without the prior consent of the GEB.

## Article 6 JOINT BOARDS

### Section 1 Requirements for Charter

The Presidents shall have the power to organize two or more local unions located in the same city or area into a joint board, or in Canada into joint councils, and shall define the jurisdiction of and cause charters to be issued to joint boards or joint councils organized by it. (The term "joint board" shall hereinafter refer also to joint councils). Joint boards shall organize, coordinate and supervise the activities of their affiliated local unions. A joint board may adopt a constitution, by-laws, resolutions and rules that do not conflict with this Constitution or the policies of UNITE HERE. Constitutions or bylaws adopted by a joint board must be approved by the Presidents …

### Section 2 Local Affiliation with Joint Board

(a) All local unions within the jurisdiction of a joint board and affiliated with such joint board shall remain affiliated with such joint board, unless exempted by the Presidents. The Presidents shall have the authority to direct a local union to affiliate with a joint board.

(b) Delegates:

> (ii) The supreme governing body of a joint board shall be a meeting of joint board delegates. A special meeting of a joint board shall be called whenever requested by its president and secretary or by its manager or in any other manner provided by appropriate constitution or by-laws. …
>
> (iv) All decisions made at a meeting of joint board delegates shall be final and binding upon the joint board, its affiliated local unions and their members.

### Section 7 Executive Board

The executive board or board of directors shall be the highest governing authority within the joint board between meetings of joint board delegates. It shall exercise general supervision over its property and affairs. …

## Article 7 AFFILIATES – GENERAL PROVISIONS

### Section 4 Use of Revenue

(b) No funds of any affiliate shall be loaned, given, or expended to assist any seceding or antagonistic organization, or any affiliate that is violating this Constitution.

**Section 6 Authority of Presidents over Charter**

(a) In accordance with its authority granted under Article 3, Section 3, the Presidents shall have the authority to:

> (i) issue charters to an affiliate;
>
> (ii) consolidate, merge, reorganize, dissolve or revoke the charter of any affiliate, or amend its charter or jurisdiction upon such terms and conditions found by the Presidents, with the approval of the Executive Committee, to be in the best interests of UNITE HERE and its members.

(b) The charter of any affiliate may also be suspended or revoked by the Presidents for the following misconduct:

> (i) its failure to comply with the Constitution or the policies, decisions or orders of a convention, the Presidents or the GEB; …
>
> (vii) any act of the affiliate intended or having the effect of terminating its status as an affiliate of UNITE HERE.

The charter or other authority shall not be suspended or revoked until the affiliate has been given notice of the charges and an opportunity to answer the charges. If the Presidents decide to suspend or revoke such charter or authority, it shall give the affiliate thirty days to comply with its decision before such action shall become effective.

**Section 7 Authority over All Affiliates**

The duties and powers of the GEB and international officers with respect to locals shall likewise apply to all other affiliates, except as provided otherwise in this Constitution.

**Article 16 CHARGES, HEARINGS AND APPEALS**

**Section 1 Grounds for Charges**

A member or a person holding an elected or appointed office or position in UNITE HERE or an affiliate may be required to appear at a disciplinary hearing when charged with any of the following offenses:

(a) Violating any provisions of this Constitution or the constitution or by-laws of an affiliate, a decision of the Convention or a decision of any officers of UNITE HERE or of an affiliate acting within the scope of their authority, or deliberately aiding or abetting another member in a violation.

(b) Gross disloyalty or conduct unbecoming a member. …

> (i) Secession or fostering secession or sponsoring or advocating decertification of, or deauthorization of union security for UNITE HERE or any affiliate.

> **Article 21 PROPERTY**
>
> **Section 1 Charter**
>
> The charter granted to an affiliate shall be and remain the property of UNITE HERE to be used by the affiliate only so long as it complies with this Constitution and the policies, rules and directives of UNITE HERE.
>
> **Section 2 Property Held by Affiliates**
>
> (a) All initiation fees, dues, other payments due or owed by members, and all other funds and property and all books and records in the possession of or subject to the control of any affiliate shall be and remain the property of UNITE HERE, but shall be retained by the affiliate with full power to use them for its proper purposes so long as such affiliate holds a valid charter issued by UNITE HERE …
>
> (b) The funds and property in the possession of an affiliate shall be exclusively devoted to the fulfillment of the organizational purposes set forth in this Constitution and shall not be liquidated or disposed of, in whole or in part, by dividing it up among the members, directly or indirectly, or by expending or diverting it in any other manner in violation of this Constitution. The International Union's Presidents shall take all necessary steps to protect the Union's property.
>
> (c) When the charter of an affiliate is revoked or becomes invalid, or when an affiliate receives notice from an employer that the employer will permanently close its operations and terminate all of the affiliate's members, then the charter, funds, books, records and other property held by or for such affiliate shall immediately be delivered to and all rights thereto transferred to UNITE HERE. It shall administer all such property in the best interests of all the members of UNITE HERE. Such delivery and transfer shall be made immediately to the Presidents by the bonded officer or person with custody or control of such property.
>
> **Article 32 APPLICATION AND AMENDMENT OF CONSTITUTION**
>
> **Section 1 Binding Effect**
>
> This Constitution shall be binding upon UNITE HERE and each local union, joint board and other affiliate of UNITE HERE. It shall be binding upon each member, officer, executive board member, business agent, organizer, employee, representative and agent of UNITE HERE and of each of its affiliates …

## X. The Applicable Legal Principles

126. Section 68 of the Act provides as follows:

> **68.** (1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question

> arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.
>
> (2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.
>
> (3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

As noted at the outset of this decision, the issue in dispute is whether the WUOC is the same union as the UHOC or, alternatively, whether the WUOC is the successor union to the UHOC. With respect to the latter alternative argument, there is no evidence to establish that the WUOC merged or amalgamated with any other trade union. Accordingly, the WUOC can only be a successor to the UHOC pursuant to section 68 of the Act if there was a "transfer of jurisdiction" from the UHOC to what is now the WUOC.

127. With respect to the question of whether the WUOC is the same union as the UHOC, the Board's jurisprudence distinguishes between the concept of a successorship, on the one hand, and the continuation of the same union under a new name, on the other. A change of name does not trigger the application of section 68 of the Act. However, the above-referenced distinction typically arises in the context of an application made to the Board under section 68 of the Act. In those cases, the Board ultimately dismisses the successor application because the trade union in question is not a successor to a predecessor union, but is in fact found by the Board to be the very same union, renamed. That is the primary position taken by the WUOC in this proceeding – that it has properly disaffiliated from UNITE HERE and is the UHOC, renamed.

128. The seminal Board decision that identifies this distinction is *Coca-Cola Ltd.*, [1975] OLRB Rep. November 862 ("*Coca-Cola No. 1*"). In that case, the applicant claimed trade union status on the basis that it was the very same entity as another organization that had previously been provided trade union status by the Board. The underlying context for the application was a decision made by the Canadian locals of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers to oppose a merger of its parent union with the Teamsters. An agreement was reached between the Teamsters and those Canadian locals of the Brewery Workers union. That agreement provided that the International Brewery union would no longer continue to exist, that certain American locals of the International Brewery union would merge with the Teamsters, and that the Teamsters would recognize the independent existence of the Canadian locals opposed to the merger. The Canadian locals promised to change the name of their unions such that their names would be clearly distinguishable from those which they had used to that date.

129. On those facts, the Board concluded that a change of identity had been effected under the auspices of the constitution of the International Brewery union. In that regard, the Board

found that "constitutional continuity" had been established. The Board made the following observations at paragraph 10 of its decision regarding the concept of constitutional continuity:

> 10. Constitutional continuity, although not pointing to a continuation of identity in this case, is relevant in our determination whether the applicant in its own right has status as a trade union. The orderly, and procedurally proper, changes in form and structure that occurred in this case indicate that, although a new organization was created, this organization did not lose the essential characteristics of a trade union that were possessed by its predecessor. There is no doubt in our minds that the applicant has inherited a structure that conforms to the requirements that have been laid down by the Board, and that under this structure the applicant carries out the essential purposes of a trade union.

As a result, the Board found that the applicant in that case was a trade union for the purposes of the Act.

130. Twelve years later some of those same parties were back before the Board. In *Coca-Cola Ltd.*, [1987] OLRB Rep. May 658 ("*Coca-Cola No. 2*"), an entity named "Independent Local 385" had applied to the Board under what is now section 68 of the Act for a declaration that it was the successor trade union by virtue of a transfer of jurisdiction resulting from its disaffiliation from the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers ("the Canadian Brewery Workers"). The Canadian Brewery Workers had determined to merge with the United Food and Commercial Workers Union. Local 385 opposed the merger and voted to disaffiliate from the Canadian Brewery Workers. The question of the propriety of the disaffiliation was not an issue before the Board, because at the time of disaffiliation Local 385 had left the parent union "in conformity with the procedures established under the constitution". What was before the Board as a live issue was whether Independent Local 385 had disaffiliated with any assets, funds, contracts, bargaining rights and other property. The Board ultimately determined that it had.

131. Also before the Board was whether Independent Local 385 was required to establish its status as a trade union for the purposes of the Act. The critical passages of the Board speaking to this question are found in paragraphs 29 and 31:

> 29. … In the instant case, Local 385 was clearly a trade union within the meaning of section 1(1)(p) of the Act prior to disaffiliation and that organization disaffiliated in compliance with the National's constitution. Following disaffiliation, the Local continued to administer the collective agreement (although both it and the National/UFCW consented to arbitration referrals), its officers continued to function, meetings of the executive and the membership continued to be held as usual. Obviously, the references to the National in the constitution, the local bylaws and the Local's name had become meaningless as a result of disaffiliation. The Local acted expeditiously and methodically in the circumstances in reviewing the constitution and bylaws and adopting those revised documents at the membership meeting in November … The Board does not consider that there was a fundamental change in the organization sufficient to affect its status as a trade union … Quite simply, Local 385 was a trade union when it affiliated to the National and, having properly disaffiliated, retained that status …

> …
>
> 31. Having regard to the foregoing, the Board concludes that this application should be dismissed. The applicant has held the bargaining rights in respect of the intervener's employees for well over a decade. The applicant retained those rights upon disaffiliation. Moreover, disaffiliation did not constitute a fundamental change in the organization sufficient to affect its status as a trade union within the meaning of the Act and its identity as an organization had continued unchanged apart from its formal name. The applicant has held the bargaining rights for the employees affected by this application for a considerable period and continues to hold those rights at present. Thus, the applicant Independent Local 385 has *not* acquired the rights, privileges and duties of its predecessor *by reason of* a merger or amalgamation or transfer of jurisdiction. The applicant is not a *successor* within the meaning of the Act to the trade union which held bargaining rights for the affected employees. The applicant is the very entity which held and continues to hold those rights. (emphasis in original)

132. These same principles, including the need for constitutional continuity, are reflected in a number of the decisions relied upon by the parties during the course of argument that speak to the question of whether a particular union is one and the same union as another. The parties relied upon the following decisions: *Consumers Distributing Company Limited*, [1981] OLRB Rep. May 509; *Food Corp. Limited*, [1983] OLRB Rep. May 636; *Hartley Gibson Company Limited*, [1986] OLRB Rep. November 1517; *Coughlan Homes Inc.*, 2000 CanLII 12437; *Environmental Commissioner of Ontario*, 2004 CanLII 47423; and *Rehab Express*, [2005] OLRB Rep. July 697. I have read and considered all of these decisions.

133. If it is determined that the WUOC is not the same union as the UHOC, the alternate position taken by the WUOC is that it is the successor to the UHOC, in accordance with section 68 of the Act. A number of the principles discussed in the above-referenced decisions are germane to the application of section 68 of the Act.

134. In *L.M.L. Foods Inc.*, [1985] OLRB Rep. August 1252, the Board was faced with a successorship question arising in the context of over 20 applications for certification. During the course of its analysis of the law, the Board made the following observations at paragraph 28 of its decision:

> The Board's early decisions recognized that the granting of a declaration of successor status required more than the mere desire of employees in a bargaining unit to change their bargaining agent: *Falconbridge Nickel Mines Ltd.*, [1960] OLRB Rep. May 73. The predecessor and successor trade unions must both have been willing to effect a merger, amalgamation or transfer and must have taken the necessary steps to accomplish that end; otherwise, the displacement of one by the other would properly be effected only by timely certification proceedings. The Board has no jurisdiction to make the declaration contemplated by section [68] unless it is first satisfied that a merger, amalgamation or transfer of jurisdiction *has* occurred, and that will not be so if persons or membership bodies within the predecessor and successor have purported to effect such a transaction without constitutional authority …

The Board in that decision also noted, at paragraph 32, that a representation vote can be of no assistance in determining whether a transaction had the authorization required by the participants' constitutions when it occurred. The Board observed in that same paragraph that "a representation vote could not repair any inadequacy in the steps taken by the predecessor or the successor to obtain the necessary authorization."

135. A decision of the Board that reflects the current state of the law in Ontario regarding the application of section 68 of the Act is *Great Atlantic & Pacific Company of Canada Limited*, [1993] OLRB Rep. September 885 ("*Great A&P*"). In *Great A&P*, the Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414 sought a declaration from the Board that it was the successor to the Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414 with respect to a bargaining unit of employees employed by the Great Atlantic & Pacific Company of Canada. The factual circumstances underlying that application are set out in considerable detail in the above-referenced decision. In a nutshell, the international parent of the RWDSU Canadian locals proposed a merger with the United Food and Commercial Workers union. Most of the Canadian RWDSU locals opposed the merger, including Local 414. Delegates of numerous Canadian locals, including Local 414, ultimately voted against the proposed merger. The next day those same delegates met and adopted a constitution for a national union called Retail, Wholesale and Department Store Union/Canada ("RWDSU/Canada"). Immediately thereafter, the delegates of those locals voted to merge with the United Steelworkers of America. The next day the international parent purported to place five locals into trusteeship, including Local 414.

136. The Board made a number of observations in *Great A&P* pertinent to the resolution of the issue in question in this proceeding. At paragraph 51, the Board notes that:

> … For one thing, the Board has discretion under section [68] as to whether to issue a declaration, as the word "may" and the option to order a representation vote indicate. This explains in part why the Board has not required strict compliance with constitutional provisions, and has in fact issued declarations where there has been substantial compliance with the spirit of those provisions, and substantial completion of the merger, amalgamation or transfer.

At paragraph 63, after reviewing a number of Board decisions, the following is said:

> In summary then, it is fair to say that the Board's approach to constitutional compliance under section [68] has been flexible, focussing on reasonable notice and common sense in a labour relations context. The effect is that in this forum, what might be considered technical defects in common law terms have not precluded successorship declarations in a number of cases.

137. Ultimately, the Board came to the conclusion that Local 414 had substantially complied with its by-laws, that approval of the disaffiliation had been triggered through the merger agreement between the international and the UFCW that met the requirements of the international constitution, and that the disaffiliation had been substantially completed. Those facts were sufficient to permit for the conclusion that Local 414 had properly disaffiliated itself from the international one day before the creation of RWDSU/Canada and the adoption of its constitution. Accordingly, on that date the international constitution did not apply to the locals,

and the locals were free to take those steps that it considered appropriate without the approval of the international.

138. This same general approach to constitutional compliance has been adopted by the Board since *Great A&P*. In *The Bay-Kingston*, [1993] OLRB Rep. December 1350, the Board described its approach in *Great A&P* as follows, at paragraph 84:

> The Board then went on to conclude that complete constitutional correctness was not a prerequisite to a successorship declaration, provided that there was sufficient compliance with constitutional norms or objectives, and sufficient indication that the merger (etc.) decision was sanctioned by the membership or accomplished through an appropriately-constituted decision-making body.

In *Famous Players Inc.*, [1995] OLRB Rep. July 954, after noting the decision of the Board in *Great A&P*, the law was summarized by the Board in the following way, at paragraph 50:

> … I do not think that it is necessary to duplicate that analysis here. It suffices to say that, viewed as a whole, the cases under section [68] illustrate two Board concerns:
>
> > (1) that the underlying transaction (the "merger, amalgamation or transfer of jurisdiction") must have been undertaken in substantial (if not complete) compliance with constitutional norms; and
> >
> > (2) that the result must generally reflect the wishes of the *employees* who may be affected by it.
>
> (emphasis in original)

Other Board decisions to this same effect include *Waterloo Region District School Board*, [2001] OLRB Rep. May/June 896, at paragraphs 22, 23 and 34; and *Winston Park Retirement Home*, [2001] OLRB Rep. November/December 1479, at paragraph 23.

139. I note here that the parties also referred me to two other relevant Board decisions, namely *Kvaerner Jaddco*, [2000] OLRB Rep. September/October 891, and *George and Asmussen Ltd.*, [2002] OLRB Rep. July/August 638. I will make specific reference to these two decisions, and others that relate to them, below.

## XI. The Positions of the Parties

140. As noted above, the trade union parties to these proceedings submitted written argument to the Board that outlined in considerable detail the evidence and case authority upon which they relied, and the conclusions that they urged the Board to reach. Two days were also put aside for oral argument. I do not intend to record below the entire argument made by the parties. I do, however, set out below a summary of the key points made by counsel in their oral and written argument.

141. The primary position of the WUOC is that the only change that has taken place on the facts of these proceedings is a change in name and affiliation of the UHOC. It states that a change

in name or affiliation does not affect the status of the UHOC as a trade union, and does not require Board approval pursuant to section 68 of the Act.

142. The WUOC asserts that there can be no dispute that before the events of March, 2009, the UHOC was a trade union within the meaning of the Act. It had by-laws, officers, members and delegates, a Director, in-house counsel, offices and other assets. It states that on and after March 16, 2009, it did all of the same things it previously did for all the same members and member locals, and with all of the same resources, but under a different name. Applying the approach taken by the Board in cases such as *Coca-Cola No. 1* and *Coca-Cola No. 2*, above, the WUOC states that it is the very same entity as the UHOC, and that the Board ought to issue a declaration to that effect.

143. Counsel for the WUOC dismisses the suggestion that the UHOC was not entitled to disaffiliate from UNITE HERE under the International constitution. The WUOC asserts that, properly interpreted, the constitution provided the UHOC with the authority to do so. The WUOC argued that there is no clause in the UNITE HERE constitution that prohibited the UHOC from disaffiliating from the International. It notes the existence in Article 5 of a provision that limits the ability of local unions to withdraw from the International. The WUOC argues that the absence of any such limitation on disaffiliation or secession in Article 6 of the constitution that speaks to affiliates implicitly permits affiliates to disaffiliate or secede from the International.

144. However, even if UNITE HERE is correct on that question, the WUOC states that the Board has not required constitutional compliance or constitutional continuity as a necessary precondition before it will find that one union is the same entity as another differently named union, or that the new union is the successor to the old union. Instead, the WUOC asserts that the Board concerns itself with whether the applicant is the same organization as the predecessor, and its form and structure, in order to determine whether there has been a fundamental change in the organization sufficient to affect its status as a trade union. Here, the WUOC argues that it is the same organization as the UHOC, and that there has been no such change.

145. The WUOC argues that there can be no dispute that the GEB resolution revoking the charter of the UHOC violated the UNITE HERE constitution in significant respects. It states that under the UNITE HERE constitution only the two Presidents had the authority to revoke an affiliate's charter, and that the GEB had no authority to do so. However, even if the constitution were read to permit the GEB that authority, the WUOC asserts that the UHOC charter was not revoked in accordance with the constitution because no notice was provided of any charges, an opportunity to answer those charges was not provided to the UHOC, and thirty days to comply with the decision to revoke the charter was also not provided to the UHOC.

146. The WUOC notes that the constitution provided the union with the authority to respond to threats of disaffiliation or secession in ways which would have maintained the constitutional bonds between UNITE HERE and the UHOC. It submits that the imposition of a trusteeship was an option available to UNITE HERE, as was removal of the officers of the UHOC. Those options were not adopted by UNITE HERE. Instead, the International determined to revoke the charter of the UHOC. The WUOC asserts that the effect of the revocation of the UHOC charter on March 13, 2009 was that the constitutional ties between UNITE HERE and the UHOC were shattered, and that the UHOC was immediately freed from the International's "constitutional prison". It notes that the fourth resolution stated, and Mr. Wilhelm confirmed, that the WUOC

"ceased to exist" for constitutional purposes. Accordingly, whether the constitution did or did not prohibit disaffiliation becomes irrelevant, because as of the passage of the GEB resolutions on March 13, 2009, there was no constitutional prohibition respecting disaffiliation applicable to the UHOC. At and after that time the UHOC was free to order its affairs and continue its existence as a trade union, independent of UNITE HERE, which it ultimately did.

147. With respect to the timing of the charter revocation, the WUOC asserts that by the very terms of the GEB resolution the charter previously granted to the UHOC was unconditionally revoked with immediate effect on March 13, 2009. It notes that there is nothing in the text of the resolution to suggest that the revocation was subject to the undertaking made to the United States District Court on March 3, 2009. The WUOC asserts that the position taken by UNITE HERE to the effect that the resolution was at all times subject to the prior undertaking is an *ex post facto* claim that lacks credibility. As both Mr. Clifford and Mr. Worhaug were in attendance at the GEB meeting on March 13, 2009, and were well aware that the UHOC had not voted to disaffiliate, the WUOC asserts that the leadership of UNITE HERE was indifferent as to whether it followed the terms of its constitution in revoking the charter of the UHOC.

148. In support of this argument, the WUOC relies upon the following passage of the Board in *Kvaerner Jaddco*, [2000] OLRB Rep. September/October 891. In that decision, one issue was whether a parent union had revoked the charters of affiliated local unions without just cause. The Board made the following observations in rendering its decision:

> 103. … If the IU unilaterally cuts the tie between it and a local union, the local union is surely not shackled by obligations to have the IU (to which it is no longer affiliated) approve changes to its constitution. It is free to order its affairs as it sees fit. It does not lie in the mouth of the IU, having revoked the charter of affiliation, to then argue that the OPC or Local Union By-law amendments are ineffective because they failed to forward the by-law changes to the IU for approval within fifteen days. The revocation of the charter ends that relationship between the two entities.
>
> 104. More fundamentally, each local union is a trade union. As such it is, at least in some limited sense, an organization formed by a group of persons who have agreed by a "constitutional contract" to bind themselves to certain rights and obligations. The agreement is among all of the members with each other. At most, the IU may be able unilaterally to sever the agreement between that group of members and the rest of the members of the IU. When it does so, however, it makes itself a stranger to the "constitutional contract" among all of the members of the local union. As such, it has no authority to alter, much less to abrogate or disallow, any subsequent changes that those members may agree upon.

149. In the event that the above-referenced argument is not persuasive, the WUOC relies upon an alternate argument to support its primary position, an argument based upon the negotiation of the March Agreement, and the inferences to be drawn from that negotiation. It argues that, to the extent that some degree of "constitutional continuity" is necessary to effect a lawful departure from the International, the combination of the March Agreement and the Presidents' Agreement provides that continuity.

150. The WUOC notes that at the same time that UNITE HERE revoked its charter, UNITE HERE was in the final stages of negotiating the March Agreement with the UHOC that defined

the future relationship between Local 75 and the UHOC. The WUOC asserts that there can be no question that Mr. Clifford and senior leaders of UNITE HERE knew when the March Agreement was being negotiated that the delegates of the UHOC would soon vote on the question of disaffiliation from UNITE HERE, and that the ultimate result of such a vote would be to disaffiliate from UNITE HERE. As noted above, I have found as a fact that on March 13, 2009 Mr. Clifford was aware that the delegates from the UHOC were likely to vote to disaffiliate at the delegate meeting scheduled for March 16, 2009.

151. The WUOC argues that it was clear to all that Local 75 did not want to remain part of a disaffiliated UHOC, and instead wished to remain affiliated with UNITE HERE. Similarly, the WUOC asserts that the UHOC did not want to take Local 75 with it when it disaffiliated from UNITE HERE, because there was no love lost between the two organizations and their leadership. It also notes that there was the possibility that the delegate strength of Local 75 could block the two-thirds majority vote required to permit the UHOC to amend its by-laws. As a result, the WUOC asserts that both Local 75 and the UHOC wanted to use the March Agreement to set out the terms of a "divorce". By doing so, both parties wanted to protect their respective bargaining rights in the circumstances, such that Local 75 would keep its bargaining rights as it exited the UHOC, and the UHOC would keep its bargaining rights as it subsequently exited from UNITE HERE. The WUOC claims that both parties achieved their goals through the negotiation and execution of the March Agreement. It notes that by the very terms of the March Agreement the bargaining rights of Local 75 are listed on Schedule A to the document, and that the UHOC and/or the remaining affiliates of the UHOC are identified as "presently the lawful exclusive bargaining agent(s) for all other employers".

152. The WUOC asserts that because everyone knew that the UHOC would be asserting the right to disaffiliate within days, the March Agreement reflects a mutual intention to do more than just secure bargaining rights for Local 75. It states that the International in fact confirmed that the UHOC held the bargaining rights at issue in the instant proceedings. The WUOC states that if UNITE HERE was of the view that immediately upon the UHOC delegates voting to disaffiliate from UNITE HERE the bargaining rights held by the UHOC would pass to the International, then when the March Agreement was executed UNITE HERE either already possessed or would shortly possess those bargaining rights. In that light, there would have been no need for the March Agreement to define and divide up any bargaining rights.

153. In a similar vein, the WUOC notes that on February 26, 2009 UNITE HERE had decided to revoke the charter of any joint board or joint council that voted to disaffiliate from UNITE HERE. Given that fact, and given the position of UNITE HERE that the March Agreement ceased to have binding effect upon the disaffiliation of the UHOC, the WUOC asks rhetorically why UNITE HERE bothered to negotiate the March Agreement in the first place, and negotiated terms in the March Agreement that spoke to future obligations and rights, well beyond March 16 2009. It points out that the parties took steps after March 14, 2009 to implement many of the terms of the March Agreement, steps that are inconsistent with the underlying position taken by UNITE HERE. One such step is Mr. Wilhelm executing the Presidents' Agreement for a second time on March 17, 2009, after the International had revoked the UHOC charter and after the UHOC had voted to disaffiliate. The WUOC asserts that the signature Mr. Wilhelm affixed to the Presidents' Agreement on March 13, 2009 was ineffective because the UHOC and Local 75 had not yet signed the March Agreement. It questions why he signed the document on March 17, 2009, if the March Agreement had already ceased to bind the parties. The WUOC argues that Mr.

Wilhelm signing the Presidents' Agreement on March 17, 2009 establishes that the International accepted the terms of the March Agreement beyond March 16, 2009.

154. The WUOC asserts that it is clear that the March Agreement was intended to act as a "divorce agreement" that was predicated upon a shared understanding that Local 75 wanted to remain with UNITE HERE and that the UHOC was leaving. It states that the parties intended that the revocation of the UHOC charter or the disaffiliation vote of the UHOC delegates would not alter any party's obligation under the March Agreement. It argues that the UHOC existed after March 16, 2009, and that Local 75 and the International recognized that existence in the form of the March Agreement. According to the WUOC, the only coherent and internally consistent interpretation of the March Agreement is that both parties sought to protect their bargaining rights, divide up various assets, accept certain responsibilities, and provide for a mechanism to resolve future disputes. It is asserted that this interpretation is consistent with the language of the March Agreement and the only practical interpretation of that document that accords with the labour relations context within which it was negotiated.

155. Finally, the WUOC asserts that the UHOC disaffiliated from UNITE HERE in accordance with its by-laws and with the full knowledge and support of its membership. It states that the WUOC is the only trade union capable of discharging the statutory duties of a trade union under the Act with respect to the employees in the bargaining units in question. In the event that the Board does not find in favour of the WUOC, it asserts that a "black hole" or "vacuum" will result in which employees will lose any effective representation. Should the Board have concern regarding the support of its membership for the decision made to disaffiliate, the WUOC asks the Board to hold representation votes to determine the wishes of the employees pursuant to section 68(2) of the Act.

156. UNITE HERE disputes all of the arguments offered by the WUOC. It asserts that the International constitution does not by its terms permit the UHOC to disaffiliate from UNITE HERE, and that any assertion made by the UHOC that it had the right to do so is simply wrong. It states that a proper interpretation of the constitution clearly reflects that the UHOC had no right to disaffiliate from UNITE HERE. In the circumstances of March, 2009, UNITE HERE states that in the absence of an agreement by the two Presidents regarding how to deal with the proposed disaffiliation of the UHOC, the GEB had the authority to respond to those disaffiliation efforts by revoking the charter of the UHOC.

157. With respect to the assertion made by the WUOC that it is the same union as the UHOC, UNITE HERE states that the WUOC and the UHOC are not the same entity, because the WUOC is clearly a rival union, competing with UNITE HERE for bargaining rights. UNITE HERE notes that on a number of occasions during her testimony Ms. Dagg referred to the WUOC as a "new union".

158. UNITE HERE concedes that the motion revoking the charter of the UHOC was passed prematurely. However, as a result of the undertaking provided by UNITE HERE to the United States District Court on March 3, 2009, UNITE HERE states that the effective date of the revocation of the charter of the UHOC was March 16, 2009, after the taking of the vote to disaffiliate by the UHOC delegates. As a result, it asserts that none of the consequences of the untimely revocation argued by the WUOC have any effect.

159. With respect to the purpose and effect of the March Agreement, UNITE HERE characterizes the position taken by the WUOC as a "desperate concoction" which emerged only after the actions of the WUOC were challenged. It argues that there was never any suggestion made by anyone involved in the negotiation of the March Agreement that the UHOC would be disaffiliating from the International, or that the March Agreement was believed to be the basis for that disaffiliation. It observes that the trade union parties have agreed that no proposals were made by the UHOC during the course of negotiations with respect to the disaffiliation of the UHOC from UNITE HERE, or what would happen to bargaining rights if that event were to occur. Furthermore, it is highlighted that Mr. Clifford acted exclusively in his role as President of Local 75 when negotiating the March Agreement, and that he and counsel for Local 75 asserted at the outset of negotiations that they had no authority to bind the International.

160. In that context, UNITE HERE argues that there is no language contained in the March Agreement that suggests that the purpose of that document was to establish the terms for a "divorce" as between the UHOC and the International. It points to the clause contained within the recitals in the March Agreement that states that the March Agreement is "strictly limited to its terms" and asserts that that provision reinforces its position. UNITE HERE also notes that after the execution of the March Agreement Ms. Dagg did not make any public announcement, orally or in writing, to the effect that the agreement had established the terms for a divorce between the UHOC and UNITE HERE. It asserts that the absence of any such announcement reflects that Ms. Dagg did not at that time truly believe that the March Agreement was intended to have that effect.

161. With regard to the assertions made by the WUOC that UNITE HERE violated its constitution in the course of revoking the UHOC charter, UNITE HERE notes that Ms. Dagg wrote the International on March 16, 2009 and asserted that she would no longer comply with or submit to any decisions of the International. It submits that no further proceeding against Ms. Dagg or the UHOC was of value because Ms. Dagg and her colleagues had proclaimed in advance that they did not consider themselves subject to the UNITE HERE constitution. The International states that it would have been a waste of time and resources, and without useful purpose to have had any further proceedings to confirm the obvious, particularly given the context of the overall situation which reflected UNITE HERE being "hijacked" by another international union. UNITE HERE asserts that even if there were constitutional violations on its part, those violations are irrelevant to the question in dispute and do not amount to the provision of constitutional permission to disaffiliate.

162. With respect to the question of whether there was sufficient membership support for disaffiliation, UNITE HERE argues that very little evidence was offered by the WUOC regarding how petition signatures were gathered by the UHOC. Furthermore, UNITE HERE highlights the "dismal" attendance at membership meetings held to vote on the various motions put to the membership by the UHOC. UNITE HERE argues that it is not clear on the evidence what information was conveyed to members at these meetings, but asserts that given the poor credibility of Ms. Dagg, the Board can reasonably conclude that the information conveyed was neither fair nor accurate. Most importantly, UNITE HERE argues that even unanimous membership support would not establish a constitutional right to support the unilateral disaffiliation by the UHOC from UNITE HERE.

163. Finally, UNITE HERE states that it is capable of representing the employees who are affected by these proceedings if it is given an opportunity to do so.

## XII. Decision

### (a) *Did the UHOC Have the Constitutional Right to Unilaterally Disaffiliate?*

164. When an application before the Board raises the question of whether a trade union is the same trade union as another trade union, or, alternatively, whether that trade union is a successor union to that other trade union, the Board has not required strict compliance with the constitutional provisions governing the relationship between the unions. However, substantial compliance with the spirit of those constitutional provisions is necessary. That is to say, in either a "same trade union" case or a true successorship application brought pursuant to section 68 of the Act, a substantial degree of what has historically been referred to as "constitutional continuity" is necessary.

165. In *Coca-Cola No. 1*, cited above, the Board stated that constitutional continuity was a relevant consideration in determining whether the applicant was in its own right a trade union for the purposes of the Act. In *Coca-Cola No. 2*, cited above, the Board noted in its decision that there was no question that the applicant had left the parent union in conformity with the procedures established under the relevant constitution. Although the law has developed since the two cases cited immediately above were authored, the fundamental principles have remained the same. The Board must have reference to the relevant constitutional provisions when it is asked to consider the question that is before this panel of the Board. Although the law no longer requires strict compliance with the relevant constitutional documents, substantial compliance is necessary in order to support a claim by a trade union that it is the same trade union as that which existed previously, with a changed name, or that it is a successor trade union to an identified predecessor trade union.

166. The question before the Board in these proceedings is answered by reference to whether the UNITE HERE constitution in force at the relevant time permitted the UHOC to disaffiliate from the International, and, if so, whether the circumstances disclose that the UHOC did so in substantial compliance with the constitution.

167. In my view, the WUOC has not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE.

168. The critical provisions of the UNITE HERE constitution are set out above in Part IX of this decision. At the outset, it is important to note what was missing from the constitution. The constitution did not contain an opting-out clause that provided the UNITE side of the union with an opportunity to walk away from the merger within a certain period of time after the date of the merger. The possibility of including such a clause into the constitution was discussed at the time that the merger was entered into. That option was rejected by the leader of the UNITE side of the union, and his view prevailed. Accordingly, the UHOC cannot rely upon such a clause to justify its decision to disaffiliate from the International. Its ability to disaffiliate or secede from the International must be found somewhere else in the constitution.

169. The constitution did permit for disaffiliation or secession in certain limited circumstances. Amongst other things, Article 5 of the constitution spoke to the rights and duties of local unions affiliated with UNITE HERE. Article 5, Section 7 of the constitution stated that a local union could not withdraw from UNITE HERE without the prior consent of the GEB. Of course, the UHOC was not a local union of UNITE HERE. It was a joint council, an "affiliate" for the purposes of the constitution. Article 6 of the constitution spoke to the rights and duties of joint boards (a term defined in the constitution to include a joint council such as the UHOC). Article 6 contained no provision that permitted a joint council the right to disaffiliate. However, in light of the partial limitation imposed upon local unions to withdraw from the International that was reflected by Article 5, Section 7 of the constitution, the WUOC submitted that the absence of any limitation on disaffiliation or secession in Article 6 required the Board to conclude that there were no limits on the right of the UHOC to disaffiliate from the International contained in the UNITE HERE constitution.

170. I disagree with that interpretation of the constitution. The weakness of that argument lies in the wording of Articles 7 and 16 of the constitution, which clearly applied to the UHOC at all times. Article 7 of the constitution spoke to further rights and duties of affiliates such as the UHOC. Article 7, Section 4(b) of the constitution provided that no funds of any affiliate could be expended to assist any seceding or antagonistic organization, or any affiliate that was violating the constitution. Article 7, Section 6(b)(vii) provided that the charter of any affiliate could be suspended or revoked by the Presidents for "any act of the affiliate intended or having the effect of terminating its status as an affiliate of UNITE HERE". Article 16, Section 1(i) of the constitution made it an offence for a person holding an elected or appointed office or position in UNITE HERE to secede or to foster secession of any affiliate.

171. In light of those prohibitions, it is simply not possible to reach the conclusion that the absence of a provision in Article 6 of the constitution that spoke to the question of secession or disaffiliation can be properly interpreted so as to have allowed an affiliate such as the UHOC to disaffiliate or secede from UNITE HERE. By definition, an affiliate such as the UHOC acts through its leaders who hold an elected or appointed office or position. If the UHOC asserts a right to disaffiliate or secede, it can only assert that right through its elected or appointed office holders. For the UHOC leader to hold such a position is by definition to foster secession, which was expressly prohibited by the constitution. In addition, for an affiliate to pursue disaffiliation inevitably required an expenditure of some funds of the affiliate (such as occurred here), which expenditure was expressly prohibited by the constitution. As counsel for UNITE HERE put it, to suggest that secession is permissible in the face of a constitution that provided disciplinary sanctions for fostering secession such as trusteeships and charter revocation is absurd. Considering the constitution as a whole, the only conclusion that one can reasonably reach is that secession of a joint council such as the UHOC was not permitted under the UNITE HERE constitution.

172. The structure reflected by the UNITE HERE constitution is a distinguishing factor when one compares the instant proceedings with a number of prior Board decisions in which the constitutional documents expressly anticipated disaffiliation or some type of mutual separation from the parent union. In those circumstances, there was no question that the entity desiring to end its relationship with the parent trade union had the express right to do so in accordance with the relevant constitutional document. No such right to leave UNITE HERE can be found in the

constitution. The leaders of UNITE and of HERE did not provide for disaffiliation or secession of joint councils when the constitution was authored and adopted back in 2004.

173. There is one Board decision that arguably reflects a different view of the law. The WUOC relied upon a passage contained in *George and Asmussen Ltd.*, [2002] OLRB Rep. July/August 638. The facts of that proceeding are considerably different than these proceedings and therefore are of little significance. It is sufficient to note that the application of section 68 of the Act was in dispute. At paragraph 28 of the decision, the Board made the following observation:

> 28. On the other hand, it may well be that in certain circumstances the Board would declare that one local union has become the successor to another local union by virtue of a transfer of jurisdiction of a single bargaining unit, even if that were done in defiance of the union's constitution. There is no point in speculating in the abstract. The Board is aware of occasions on which one union will engage in a "friendly raid" on another, even if the parent body of the union does not approve. If for some reason such a "raid" could not be made, a local union might attempt to effect a transfer of jurisdiction. In such a case, particularly if the employees affected supported such a move, the opposition of a parent body in the union and a lack of constitutional authority might well be insignificant to the Board. Those are not the facts we have before us in this case.

The WUOC argued that the above-referenced passage supported its position that constitutional continuity or substantial compliance with the spirit of the constitution was not a necessary prerequisite to a finding in its favour.

174. I disagree with that position. It is evident from a reading of the above-referenced passage that the observations of the Board were not necessary for the purpose of reaching the decision that it ultimately did, and that they were speculative. In fact, counsel for the WUOC acknowledged during argument that the passage was clearly *obiter*. As a result, the passage is not authority for the assertion made by the WUOC. In fact, the very next statement made by the Board in paragraph 29 of the decision is that "constitutional compliance is one factor, and an important factor, in any section 68 inquiry". That statement contradicts the position taken by the WUOC as to the import of this passage, as does the Board's ultimate conclusion, at paragraph 32, that it would not exercise its discretion under section 68 of the Act, in part because there was no clear indication of substantial compliance with the asserted predecessor's constitution.

175. Constitutional continuity is a prerequisite to the conclusion ultimately sought by the WUOC, namely that it is the same union as the UHOC. There is no constitutional continuity reflected on the facts, because the UHOC had no right to disaffiliate from the International in accordance with the UNITE HERE constitution.

### (b) *The Effect of the March Agreement*

176. I turn next to the effect of the March Agreement dated March 14, 2009, and the Presidents' Agreement signed by the two Presidents on March 13 and 16, 2009, and for a second time by Mr. Wilhelm on March 17, 2009. As noted earlier, the purpose and effect of the March Agreement was one of the most bitterly contested issues in these proceedings.

177. The WUOC asserts that the March Agreement, when reviewed in the full context of the events taking place at the time of its negotiation and execution, clearly establishes that the International intended the document to act as an agreement permitting the UHOC to disaffiliate or withdraw from UNITE HERE. The WUOC states that the parties' subsequent adherence to the March Agreement reflects sufficient constitutional compliance such that the circumstances fall within existing Board jurisprudence regarding successorship cases or "change of name" proceedings.

178. I do not accept the assertions made by the WUOC with respect to the March Agreement on a number of grounds.

179. The WUOC and UNITE HERE agree that the negotiations regarding the terms of the March Agreement were completed in the total absence of any assertion made by the UHOC or its counsel at the time that the March Agreement was intended to facilitate the disaffiliation of the UHOC from UNITE HERE. Accordingly, at no time prior to signing the document did the UHOC, Ms. Dagg or counsel for the UHOC communicate to anyone involved with the negotiations that the purpose of the March Agreement was to facilitate the disaffiliation of the UHOC from UNITE HERE. Of course, that agreed upon fact is not determinative of the assertion made by the WUOC, because as always the question of what effect a negotiated agreement may have is answered by reference to what the document actually says and does, rather than what each individual party subjectively intended the document to do.

180. However, when considered on an objective basis, there is little contained in the March Agreement to support the position taken by the WUOC. There are no words contained in the text of the March Agreement that clearly identify it as a document intended to facilitate the disaffiliation of the UHOC from the International. Ms. Dagg testified that it was not necessary for the parties to deal with disaffiliation in the March Agreement because all involved understood the context within which the document was being negotiated. The basis for her conclusion that all involved understood the context of imminent UHOC disaffiliation included her views that "everyone knew what was going on", that "I would assume that [Mr. Clifford] would have the right to speak and represent the International union", that "Mr. Clifford is extremely close with President Wilhelm" and that "I expect that [Mr. Clifford] does not sign, send, communicate anything without President Wilhelm's knowledge and understanding and approval".

181. I do not accept the position taken by Ms. Dagg. The March Agreement states on its face that the UHOC and Local 75 acknowledge that the agreement "is strictly limited to its terms". Ms. Dagg could not explain during cross-examination how those words could be interpreted other than by reference to their plain meaning - that the parties intended the document to speak for itself, and that it was not to be interpreted to apply to or to relate to any matter beyond those matters clearly identified on the face of the document. Disaffiliation of the UHOC from UNITE HERE is *not* one of those matters.

182. The position taken by the UHOC during argument regarding the purpose and effect of the March Agreement glosses over a critical fact, namely that the International is not a party to the document. The International is undoubtedly referred to within the March Agreement, as is the Presidents' Agreement. However, the International did not sign the March Agreement, because it is not a party to that agreement. In its written submissions the WUOC asserts that the obvious

explanation for the forward-looking nature of the March Agreement is that "the parties intended to enter into a divorce agreement". During oral argument reference was made to "both sides" or the "parties" understanding what the March Agreement was intended to accomplish. But the actual parties to the March Agreement are the UHOC, on the one hand, and Local 75, on the other. In fact, Ms. Dagg herself recognized that at numerous points in her testimony, when she stated that the UHOC believed that it was negotiating a divorce agreement between itself and Local 75. The evidence is undisputed that counsel for Local 75 advised the UHOC and its counsel at the very outset of the negotiations leading to the execution of the March Agreement that he did *not* represent the International. Furthermore, Mr. Clifford, who signed the March Agreement, specifically executed it "for Local 75", signing his name and identifying himself as President of Local 75.

183. In my view, UNITE HERE has agreed to none of the obligations or acknowledgements contained in the March Agreement. It neither promised nor made any representations about the past, the present or the future with respect to its relationship with the UHOC. The Presidents' Agreement does confirm that the March Agreement is fully compliant with the UNITE HERE constitution, that Local 75 is exempt from affiliation with the UHOC effective March 1, 2009, and that certain bargaining rights listed in Schedule "A" to the March Agreement are reconfirmed and settled with Local 75. The confirmation by the Presidents that the March Agreement is fully compliant with the constitution does not assist the WUOC, because the March Agreement by its terms contains confirmations and agreements between Local 75 and the UHOC. It could hardly be a violation of the constitution for Local 75 and the UHOC to confirm or agree to things. The confirmation by the Presidents regarding the bargaining rights reconfirmed and settled with Local 75 says nothing on the part of the International with respect to its views regarding the locus of the bargaining rights that do not belong to Local 75. If the UHOC had wanted a confirmation from the International that the remaining bargaining rights were "reconfirmed and settled" in its hands, it ought to have insisted that language parallel to that contained in the Presidents' Agreement relating to Local 75 be included in the Presidents' Agreement with respect to it. It did not do so.

184. None of the confirmations contained in the Presidents' Agreement act as an acknowledgment that UNITE HERE has given its consent to the UHOC to disaffiliate, or that UNITE HERE had any understanding or arrangement regarding what would occur if the UHOC determined to vote to disaffiliate from the International. The position taken by Mr. Wilhelm throughout 2008 and 2009 was that the UHOC (and any other joint board or joint council) was not entitled to disaffiliate from UNITE HERE. His confirmation that the March Agreement complies with the International constitution does not alter that position, and does not lead to the conclusion urged by the WUOC.

185. If the underlying purpose of the March Agreement was to facilitate the disaffiliation of the UHOC, I find it curious that Ms. Dagg did not communicate its signing to supporters of the UNITE side of the union after March 14, 2009. Ms. Dagg asserted during cross-examination that the March Agreement was a significant achievement for the UHOC and was important to her and to the members of the UHOC. For there to be "radio silence" from Ms. Dagg regarding what could only be said to have been a ground-breaking agreement facilitating the disaffiliation of the UHOC from UNITE HERE is so uncharacteristic that it is notable. It is also notable that the purported effect of the March Agreement is not identified in the resolutions passed by the UHOC when it voted to disaffiliate from the International on March 16, 2009. The conclusion I draw is the obvious one – that notwithstanding her testimony to the contrary, at no time while the March

Agreement was being negotiated did Ms. Dagg ever understand the March Agreement to be an acknowledgement by UNITE HERE that the UHOC could disaffiliate at its convenience.

186. It is significant to note that the agreements reached by the UHOC and Local 75 in the March Agreement were expressly backdated to take effect on March 1, 2009. There was a considerable amount of testimony offered by Ms. Dagg about why the document was backdated to March 1, 2009, none of which was particularly helpful because it was based upon assumptions made by Ms. Dagg regarding the motivation of Mr. Clifford. In my view, there were many reasons why the document was backdated. At the very least, the UHOC resolution that removed Local 75 from the UHOC occurred on February 27, 2009, as was said to have immediate effect. Furthermore, the letter authored by Mr. Raynor dated March 2, 2009 also purported to disaffiliate Local 75 from the UHOC effective immediately.

187. Ultimately, the reason for the backdating really does not matter. As a result of the backdating, the March Agreement by necessity spoke to circumstances as they existed on and after March 1, 2009. It is consistent with that backdating for the terms of the March Agreement to confirm that the UHOC was "presently" the lawful exclusive bargaining agent for certain employers, because to do so clearly refers to the situation as it stood on March 1, 2009 (or, for that matter, on any other date in March, 2009 before March 13, 2009). Many of the references in the March Agreement that speak to the future can be reasonably read as referring to the time period running from March 1, 2009. As a result, even if the March Agreement could be viewed as being an agreement binding the International, the assertion made by the WUOC that the forward-looking nature of the March Agreement unequivocally reflects an intention on the part of UNITE HERE to acknowledge the right of the UHOC to unilaterally disaffiliate is without merit. There is no such unequivocal intention reflected by the document.

188. There are some obligations identified in the March Agreement that do assume that the UHOC will continue to exist beyond March, 2009. An example of this is section 11, in which both the UHOC and Local 75 agree to reconcile expenses incurred after March 1, 2009 "as soon as practicable after April 1, 2009". The existence of this clause in the March Agreement (and others like it) is at least arguably inconsistent with the position taken by Mr. Clifford during his testimony, namely that the March Agreement ceased to bind the parties on March 16, 2009, the date he viewed the revocation of the UHOC charter to have taken effect. UNITE HERE also asserted that the effective date of the revocation of the UHOC charter was March 16, 2009.

189. Again, assuming that the March Agreement does bind the International, I do not believe that the inclusion of section 11 of the March Agreement (and others like it) leads one to the result urged by the UHOC. The parties commenced negotiations regarding the terms of the March Agreement on March 2, 2009, and the final version of the document was executed on March 14, 2009. Much occurred between March 2, 2009 and March 14, 2009 that could not have been anticipated as the document was being negotiated. No one really knew what the future held for the UHOC and Local 75 at that time. As a result of the revocation of the UHOC charter on March 13, 2009, Mr. Clifford and legal counsel for Local 75 perhaps could have re-assessed the terms of the March Agreement to determine whether they were entirely consistent with what they believed the International might urge as the theory of a yet-to-be-filed Board proceeding, and propose to Ms. Dagg and legal counsel for the UHOC that those terms be renegotiated. But that would have been entirely unrealistic. At the very least, Mr. Clifford held the view that the revocation of the UHOC charter would only kick in should the UHOC delegates vote to leave

UNITE HERE. He did not perceive there to have been a revocation of the UHOC charter as at that time.

190. Quite simply, this is one of the "square peg/round hole" situations to which reference was made at the outset of these reasons. The revocation of the UHOC charter on March 13, 2009 could in theory reflect a position consistent with the position asserted by the WUOC. But it also may not. A similar inconsistency appears to exist in the position taken by the WUOC. If its charter was revoked on March 13, 2009, and the UHOC did not exist after that date, how could Ms. Dagg sign the March Agreement on March 14, 2009 on its behalf? Ms. Dagg accurately noted during her testimony that this was "part of the confusing part of what occurred during that period of time".

191. In the circumstances as they existed at that time, I do not believe that Mr. Clifford turned his mind to whether all of the clauses in the March Agreement would be enforceable going forward, or whether the document could be interpreted in the fashion urged by the WUOC. What is clear from the testimony is that Mr. Clifford desired, beyond all else, to ensure that a document existed to reflect an understanding that Local 75 had an exclusive claim to certain bargaining rights. He wanted Ms. Dagg to sign it, on behalf of the UHOC, which was the only entity that existed at the time that might make claim to those bargaining rights. As he saw it, the March Agreement and the Presidents' Agreement, combined, provided him with the comfort he needed to ensure that Local 75 was protected. I do not read into the terms of the March Agreement anything more than that.

192. In a similar vein, the WUOC points to the fact that Mr. Wilhelm re-signed the Presidents' Agreement on March 17, 2009 as a significant admission against interest. It notes that by that date Mr. Wilhelm had actual notice of the UHOC disaffiliation, because Ms. Dagg by that date had sent a letter to Mr. Wilhelm and to Mr. Raynor by facsimile and by e-mail confirming the vote of the UHOC delegates to disaffiliate. If the UHOC had ceased to exist on March 16, 2009 at the latest, the WUOC asks why Mr. Wilhelm felt it necessary to confirm that an agreement with a constitutionally non-existent entity was fully compliant with the UNITE HERE constitution.

193. Mr. Clifford testified that he thought that it was a good idea to have the signatures of both Presidents on one page, rather than two. He testified that he asked Mr. Wilhelm to sign the document again, only this time on the sheet containing the signature of Mr. Raynor. I accept that testimony. Mr. Wilhelm in response to the request made by Mr. Clifford then signed the page executed the previous day by Mr. Raynor. It is as simple as that. In my view, there is no inference of any significance at all to be drawn from the fact that Mr. Wilhelm re-signed the Presidents' Agreement on March 17, 2009.

194. I note here that I disagree with the assertion made by the WUOC that the first signature placed by Mr. Wilhelm on the Presidents' Agreement dated March 13, 2009 was ineffective. The WUOC asserts that it was ineffective because the March Agreement had not yet been signed. One of the recitals to the March Agreement asserts that the "Presidents of UNITE HERE have agreed to the disaffiliation of Local 75 from the Council". The March Agreement therefore anticipated that the two Presidents would execute the Presidents' Agreement before the March Agreement could be properly executed. In that light, the signature of Mr. Wilhelm on March 13, 2009 can hardly be seen to be ineffective. Although there seems to be no dispute that there were minor changes made to the March Agreement on March 14, 2009, after Mr. Wilhelm had signed the

Presidents' Agreement, there was no evidence offered to establish what those minor changes consisted of. In the circumstances, I am not satisfied that the execution by Mr. Wilhelm of the Presidents' Agreement on March 13, 2009 was ineffective.

195. The WUOC asserts that the only coherent and internally consistent interpretation of the March Agreement signed on March 14, 2009 is that the UHOC and UNITE HERE sought to protect their bargaining rights, divide up various assets, accept certain responsibilities, and provide for a mechanism to resolve future disputes – all of which is consistent with the expectation that the UHOC would be imminently disaffiliating from UNITE HERE. For the reasons set out above, I do not agree that the March Agreement reflects any such intention on the part of UNITE HERE. Mr. Clifford testified that one of the things that the March Agreement was intended to ensure was that Local 75 would became disaffiliated from the UHOC, with its bargaining rights intact. Mr. Wilhelm confirmed that his understanding was the same as that of Mr. Clifford. That primary purpose is reflected by the March Agreement and is confirmed by the terms of the Presidents' Agreement. The March Agreement also achieved other purposes, but it did not provide the UHOC with the authority to disaffiliate from the International.

196. I conclude that the March Agreement did not provide the UHOC with any constitutional basis to support its disaffiliation from UNITE HERE.

### (c) *The Effect of the Revocation of the UHOC Charter*

197. I turn next to the legal consequences of the resolutions authored by the GEB on March 13, 2009. Distilled to its most basic elements, the WUOC argues that the GEB acted prematurely when it revoked the charter of the UHOC. By doing so, and by not complying with the provisions of the constitution that provide certain due process rights to the UHOC, the WUOC asserts that the International effectively "cut loose" the UHOC into a stand alone body, without any obligations or ties to the International. In that context, the WUOC asserts that the Board should conclude that the UHOC left UNITE HERE with all of its bargaining rights intact, changed its name first to the Ontario Council, and then subsequently changed its name to the WUOC, such that it is the same union as the UHOC or, alternatively, a successor to the UHOC. The WUOC relies upon certain passages found in the Board's decision in *Kvaerner Jaddco*, cited above, in support of its position.

198. As noted above, UNITE HERE argued that the resolutions authored and voted upon by the GEB on March 13, 2009 were at all times subject to the undertaking made before Judge Daniels in the United States District Court on March 3, 2009. It states that it at all times intended to comply with that undertaking, and that the UHOC charter was not formally revoked until March 16, 2009, after the delegates of the UHOC cast their ballots to disaffiliate. The WUOC, on the other hand, submitted that that argument was an *ex post facto* construct on the part of UNITE HERE.

199. It is of some irony that the position taken by the WUOC itself on this argument takes on the appearance of being an *ex post facto* construct. The WUOC asserts that the revocation of its charter immediately triggered certain legal consequences that favour the conclusion that it seeks the Board to reach. However, on March 16, 2009, when the UHOC delegates met to disaffiliate from UNITE HERE, the resolutions passed by the UHOC reflect that the delegates did not believe that UNITE HERE had properly revoked the UHOC charter. The fourth and fifth recitals in Resolution 1 state that the GEB had "purported" to revoke the UHOC charter or had

"asserted" its revocation. This wording is consistent with the position taken by Mr. Raynor on March 13, 2009 that the GEB resolutions were unconstitutional, and the position taken by Ms. Dagg during her testimony that the meeting of the GEB on March 13, 2009 was "improperly held". Days after the revocation of the UHOC charter the leadership of the UHOC did not apparently view the resolutions of the GEB passed on March 13, 2009 to be legally effective. At some point since then, legal theories of the case have changed, as has the position of the WUOC.

200. In my view, the position taken by UNITE HERE on the question of the date of revocation of the UHOC charter is not persuasive. At this time, it is entirely speculative to consider whether the International would have altered the wording of the resolution as it related to the UHOC if it had been aware of the true state of affairs on March 13, 2009. Mr. Wilhelm is quoted in the transcript of the GEB meeting on March 13, 2009 as indicating that he had recently reviewed the transcripts of the proceedings before Judge Daniels, and presumably this means that he was conscious of the undertaking made in the United States District Court. However, the real question is what actually occurred, not what might have occurred if Mr. Wilhelm and the GEB had not misunderstood the steps taken to that date by the UHOC. No reference was made to the undertaking entered into before Judge Daniels in the text of the resolutions passed on March 13, 2009 because Mr. Wilhelm believed at that time that the UHOC had in fact already voted to disaffiliate. Accordingly, the resolutions voted upon and adopted by the GEB on March 13, 2009 were unequivocal. Furthermore, no resolution was ever passed subsequently by the GEB amending, revoking or altering the substance of the initial resolutions. Although it is quite possible that the resolutions may have been differently worded had Mr. Wilhelm appreciated the true state of affairs, the fact is that the resolutions were unqualified. The only conclusion that can be drawn from the circumstances is that the UHOC charter was in fact revoked on March 13, 2009.

201. That established, in my view the revocation of the UHOC charter by UNITE HERE on March 13, 2009 does not have the legal effect asserted by the WUOC.

202. At this juncture, it is necessary to comment upon the proper interpretation of certain provisions of the UNITE HERE constitution. It will be recalled that an unusual feature of the UNITE HERE constitution at the time is that it established two Presidents that were to act in tandem with respect to many of the rights and obligations contained in that constitution. As noted at the outset of these reasons, during the course of Ms. Dagg's evidence it became clear that there was a difference of opinion regarding the underlying purpose for this unique structure. Ms Dagg is of the view that the two Presidents were expected to reach a consensus upon every issue of significance. Mr. Wilhelm disagreed with that view. I indicated above that in my view the position taken by Mr. Wilhelm was correct, and that it was the GEB that was responsible for dealing with situations should the two Presidents have become deadlocked.

203. To suggest that the International constitution should be interpreted so as to require the Presidents to jointly agree upon all issues of significance, and to assert that there is no alternative to deadlock in the event of an ongoing disagreement between the two Presidents, is entirely untenable. No trade union (or, for that matter, any other organization) could operate for any length of period with that type of leadership model in place. Interpreting the constitution in such a fashion, even in the absence of bad faith on the part of one of the Presidents, would inevitably result in absolute chaos. In my view, the authors of the International constitution understood that potential problem and structured the constitution to account for it. They dealt with the possibility

of deadlock between the two Presidents by authorizing the GEB to resolve any such disagreement. Quite simply, if the authors of the constitution had intended to provide an overriding veto to both of the two Presidents, they would have specifically stated that in the constitution. They did not do so.

204. Article 3, Section 3 of the International constitution spoke to the authority of the Presidents. It provided that the two Presidents were to determine any and all questions as to the "application, interpretation or construction" of the constitution. That same provision stated that the GEB was to "resolve any disagreement between them". This latter power of the GEB was largely reiterated in Article 3, Section 6(c)(i) of the constitution. Although the wording in the latter subsection was narrower (specific reference being made only to the power to "determine all questions regarding the interpretation" of the constitution in the event of a disagreement between the two Presidents), the opening words of Article 3, Section 6(c) were very broad. The GEB was said by that provision of the constitution to have had "general supervisory powers over all the affairs of UNITE HERE and its affiliates". The authority to determine all questions involving the interpretation of the constitution in the event of a disagreement between the two Presidents was expressly stated to be included within that broader general power. That clause was entirely consistent with Article 3, Section 3 of the constitution, which expressly provided the GEB with broad powers to resolve any disagreement between the Presidents dealing with the application, interpretation or construction of the constitution. The power of the two Presidents was very broad, and the power of the GEB to step in and resolve a disagreement regarding the application, interpretation or construction of the constitution was equally as broad.

205. When the constitution required both Presidents to take certain steps or to make certain decisions, and it developed that Mr. Raynor and Mr. Wilhelm could not agree upon taking those steps or making those decisions, those disagreements were referred by Mr. Wilhelm to the GEB for resolution. In my view, it was entirely constitutional on the part of Mr. Wilhelm to have done so. Ms. Dagg clearly viewed the situation to be unfair, inasmuch as the membership of the GEB was more heavily weighted numerically in favour of the HERE side of the union. That was the structure of the union leadership that was agreed upon at the time of the merger in 2004. That unfortunate reality from the perspective of Ms. Dagg was clearly the underlying basis for her theory that the constitution established a mandatory consensus model for Presidential decision-making, her assertions that the GEB had no role in dealing with disagreements between the two Presidents, and her claim that the GEB meetings held in February, 2009 and March, 2009 were unlawful. I disagree with her theory and her assertions. In my view, the constitution was clear. In the absence of an agreement between the two Presidents, it was the GEB that was to be resorted to in order to resolve those disagreements.

206. This is exactly what happened when UNITE HERE revoked the charter of the UHOC on March 13, 2009. Article 3, Section 3(a)(xvi) of the constitution provided that the two Presidents acting jointly had the right to revoke the charter of any affiliate. Similarly, Article 6, Section 2(a) of the constitution provided that all local unions within the jurisdiction of a joint board and affiliated with that joint board were to remain affiliated with that joint board unless exempted by the two Presidents. At the GEB meeting held on March 13, 2009, a meeting properly called by Mr. Raynor, Mr. Wilhelm read to Mr. Raynor the resolutions put before the GEB that revoked the charter of the UHOC and provided that all of the affiliation agreements between the UHOC and the local unions previously affiliated with it were nullities, and that the local unions were to become directly affiliated with UNITE HERE. Mr. Raynor was asked by Mr. Wilhelm

whether he agreed with those resolutions. He answered that he did not. The disagreement of the two Presidents was evident. The disagreement clearly related to the "interpretation, application or construction" of the constitution. At that point, the resolutions were put to a vote of the GEB and passed. In my view, the voting on these resolutions was simply an example of the GEB exercising its "general supervisory powers over all affairs of UNITE HERE and its affiliates" in the very circumstances that the constitution anticipated it would do so.

207. What are the consequences of the GEB resolving to revoke the charter of the UHOC? The WUOC asserts that the effect of doing so was to provide the UHOC with the authority to unilaterally disaffiliate from the International.

208. The WUOC asserts that this very issue was canvassed by the Board in *Kvaerner Jaddco*, cited above. As noted by the Board at paragraph 92 of that decision, the Board must begin its consideration of this issue by reference to the union's constitutional documents and those of the UHOC. A review of those documents will assist the Board in determining what the parties have agreed will result in those circumstances. In particular, a review of those documents will assist the Board in determining whether the parties anticipated that the UHOC would continue to exist in some fashion after the revocation of its charter.

209. I turn first to the agreement reached between the UNITE Ontario Council and Local 75, the document that created the UHOC in September, 2004. It is a relatively short document. Article 3 of that document provided that on September 14, 2004 all property of the UNITE Ontario Council and Local 75 was transferred to the UHOC, except as otherwise set out therein. This is the only clause in this agreement that has any real bearing on the effect of the revocation of the UHOC charter.

210. The by-laws of the UHOC do provide some guidance. Article 1, Section 2 of that document provided that the UHOC would be affiliated with UNITE HERE. Article 1, Section 3 of the by-laws provided, in part, that all local unions within the jurisdiction of the UHOC were to be affiliated with the UHOC unless exempted by the GEB of UNITE HERE. It also provided that all local unions affiliated with the UHOC were to be subject to the UNITE HERE constitution. Of significance is Article 17 of the by-laws, which provided that the International constitution is incorporated into the by-laws, and that in the event of any conflict between the by-laws and UNITE HERE constitution, it is the latter that prevailed.

211. Turning to the UNITE HERE constitution, Article 21 provided that the charter remains the property of UNITE HERE and was to be used by the affiliate only so long as it complied with the Constitution and the policies, rules and directives of UNITE HERE. As outlined above, in my view the constitution established that the Presidents (and, in the event of their disagreement, the GEB) had the authority to revoke the charter of the UHOC on March 13, 2009. Article 21, Section 2(c) stated that when the charter of an affiliate was revoked or became invalid, as was the case here, the charter, funds, books, records and other property held by or for that affiliate were to be immediately delivered to and all rights in that property were to be transferred to UNITE HERE. In fact, the constitution provided that the International had property rights in all of those assets at all relevant times. Article 21, Section 2(a) of the constitution provided that all initiation fees, dues, other payments due or owed by members, and all other funds and property and all books and records in the possession of or subject to the control of the UHOC "shall be and remain the

property of UNITE HERE, but shall be retained by the affiliate with full power to use them for its proper purposes so long as such affiliate holds a valid charter issued by UNITE HERE …".

212. When the UHOC first became an affiliate of the International it agreed to be bound to the terms of the UNITE HERE constitution. That constitution gave the UHOC no right to disaffiliate from UNITE HERE. In the absence of a subsequent constitutional amendment permitting an affiliate such as the UHOC to opt-out or to disaffiliate from the International, by affiliating with the International in September, 2004 the UHOC permanently linked itself with UNITE HERE. It was locked in as an affiliate. Moreover, its property immediately became the property of UNITE HERE, and it was provided with the right to retain that property and to use it for "proper purposes", but only so long as the UHOC held a valid charter.

213. It was the existence of a valid UNITE HERE charter that provided the UHOC with its status as an affiliate of UNITE HERE. Its ongoing existence was dependent upon it maintaining a valid charter. To the extent that the UHOC held property and had imbedded within it the attributes, rights, duties and privileges of a UNITE HERE affiliate, it only held that property and maintained those attributes, rights, duties and privileges because of the ongoing validity of a UNITE HERE charter granted through the International constitution.

214. The revocation of that charter by the International immediately ended the existence of the UHOC. The subsequent revocation of that charter ended all of the above-referenced attributes, rights, duties and privileges, and its authority to hold the property of the International, the rights in which property immediately returned to the International in accordance with Article 21, Section 2(c) of the constitution. That Article provided that when the charter of an affiliate like the UHOC was revoked, that charter and the funds, books, records and other property held by the affiliate were to be immediately delivered to UNITE HERE. There is no evidence to suggest that any person with custody or control of such property (presumably Ms. Dagg) ever delivered or transferred anything to the Presidents of UNITE HERE. However, the failure to do so does not detract from the clear intention of the constitution, which was to immediately deliver to the International from the former affiliate whose charter had been revoked all of its property retained and used by that former affiliate, including its books, records and financial assets. The constitution provided that that property was the property of the International.

215. The WUOC asserted during argument that the existence of the UHOC could not just come to an end as a result of the revocation of its charter, because the UHOC could trace its lineage back to the start of the 20th century and was not created anew by the International.

216. I disagree with that assertion. The UNITE HERE constitution reflected a very strong role for the parent body. It is clear from the terms of the constitution that this was the exact result provided for by that constitution in the event that the charter of an affiliate was revoked. The UHOC joined UNITE HERE voluntarily, by way of a vote of delegates. Once it joined UNITE HERE, the UHOC was bound to adhere to the International constitution, in accordance with that constitution and its own by-laws. Its delegates undoubtedly knew that at the time they voted to join UNITE HERE. They also knew or ought to have known that disaffiliation was not provided for in the constitution, and they knew or ought to have known the effect of the constitution as it related to the property held by the UHOC. Whether the UNITE Ontario Council did or did not have long lineage is irrelevant. When it joined UNITE HERE and agreed to abide by the

constitution, it had the same rights, duties and obligations under that constitution as did any new local chartered by the International.

217. I note here that Mr. Wilhelm testified that as a result of the resolution passed by the GEB on March 13, 2009 the UHOC "ceased to exist for the purposes of our constitution". That testimony is consistent with the conclusion set out above. On his last day of testimony, Mr. Wilhelm agreed with counsel for the WUOC that he (presumably as leader of the International) did not have the ability to "exterminate" the UHOC or to "wipe it out". Whether Mr. Wilhelm knew it or not, the effect of the GEB resolutions on March 13, 2009 was to "exterminate" or to "wipe out" the UHOC. His failure to appreciate the legal consequences of those resolutions does not change the result reached above. Quite simply, that is what the resolutions of the GEB did. Combined with the resolution of the GEB that transferred the affiliation of locals previously affiliated with the UHOC directly to the International, there was nothing left behind but a vacuum where the UHOC previously stood.

218. This result is undoubtedly severe. Previous decisions of the Board have referred to the revocation of a local union charter as resulting in the "evaporation" or "extinction" of that union, or as having "vaporized" it (see *International Union of Bricklayers and Allied Craftworkers*, [1999] OLRB Rep. July/August 621, at paragraph 42, and *Brick and Allied Craft Union of Canada*, [2001] OLRB Rep. May/June 615, at paragraphs 169 and 171). It explains why the Board's jurisprudence has referred to the revocation of a charter as amounting to "the gravest penalty that can be meted out by a parent union" or "the most extreme form of action a parent union can take" (see *International Union of Bricklayers and Allied Craftworkers*, cited above, at paragraph 36, and *Brick and Allied Craft Union of Canada*, cited above, at paragraph 169).

219. Ultimately, on March 16, 2009, the Director of what previously was the UHOC, together with a number of delegates from prior UHOC locals that had in fact become directly affiliated with UNITE HERE, met, established the "Ontario Council", voted into effect new by-laws, and then, shortly thereafter, renamed it the WUOC. As a matter of law it is not possible to view the Ontario Council or the WUOC as the "same entity" as the UHOC, but with a different name. The WUOC is undoubtedly the same entity as the Ontario Council, renamed, but the Ontario Council is not the same entity as the UHOC, because of the revocation of the UHOC charter. The very act of revoking the charter eliminated any possibility that what was subsequently created by former UHOC delegates could be characterized as the "same entity" as the UHOC.

220. The WUOC noted during argument that the International did not comply with the provisions contained in the constitution that were intended to protect affiliates such as the UHOC that are at risk of having their charters revoked. The UHOC was not given notice of charges brought against it, and was not provided with thirty days to comply with the decision of UNITE HERE as required by Article 7, Section 6 of the constitution. As noted earlier, the WUOC points out that the International could have turned to other forms of relief – a trusteeship imposed upon the UHOC or charges brought against the leadership of the UHOC – rather than revoking the charter of the UHOC with such immediacy.

221. There can be no doubt that UNITE HERE did not invoke alternate options available to it to protect its interests – imposing a trusteeship upon the UHOC, or filing charges against Ms. Dagg and others being the most obvious of those options. Mr. Wilhelm testified that he and

the other UNITE HERE leaders saw little value in invoking those potential remedies, and considered those options to be a "waste of time and resources" and of "no useful purpose". This assessment made by the International was heavily criticized by the WUOC during argument. However, looked at objectively, and in the context of what was then going on within the union at large, it is difficult to disagree with the assessment made by Mr. Wilhelm and other UNITE HERE leaders. Ms. Dagg made it absolutely clear through her correspondence addressed to Messrs. Raynor and Wilhelm on March 16, 2009 that she did not consider herself bound to the International constitution. Furthermore, neither Ms. Dagg nor Mr. Raynor considered the decisions of the GEB to be constitutionally lawful. They openly expressed that view. Ms. Dagg somewhat disingenuously testified that she was not sure what would have occurred had the International imposed a trusteeship on the UHOC, suggesting that the UHOC would have had to decide what it would do in those circumstances. In my view, it is highly likely (if not inevitable) that the UHOC would have denied the authority of the International to have done so. In fact, the WUOC acknowledged as much in its written submissions, conceding that it is "entirely likely" that the UHOC would have disputed any alternative action taken by UNITE HERE.

222. There can also be no doubt that the International did not comply with the mandatory notice requirement contained in Article 7, section 6 of the International constitution. Again, it is not difficult to appreciate why that constitutional provision was not complied with given the context of what was going on at that time within the broader union. By March 13, 2009, various UNITE HERE joint boards, councils and local unions across North America had asserted a right to disaffiliate with their assets and bargaining rights, a right that the International did not believe existed. The leadership of UNITE HERE was attempting to deal with a General President who was undermining the very union that he led while remaining in office, which efforts included assisting those same joint boards, councils and local unions to affiliate with a rival trade union that he would shortly lead. In those circumstances, the leadership of UNITE HERE was required to act in an expeditious fashion in order to protect the interests of its membership as a whole. That is what they did.

223. Imposing a trusteeship or providing thirty days notice to the UHOC of an intention to revoke its charter would have had no effect but to provide to the UHOC and its leadership a thirty day head start to strategize and secure their respective positions. It is naïve to think that some meaningful purpose would have been served had thirty days notice to revoke been given to the UHOC by UNITE HERE. This is not a case such as *International Union of Bricklayers and Allied Craftworkers*, cited above, in which the parent union "acted out of frustration rather than reason". It acted reasonably having regard to the circumstances as they then existed.

224. The failure by UNITE HERE to have complied with the mandatory notice provision contained in Article 7, Section 6 of the constitution was a breach of that constitution, but the failure to give such notice did not trigger any legal consequences that support the position taken by the WUOC in these proceedings. The WUOC does *not* assert that the revocation of its charter was ineffective because of that breach – in fact, the WUOC expressly relies upon the validity of the GEB resolutions to revoke the UHOC charter in support of its position. The breach of the constitution by UNITE HERE, although established, does not move the case argued by the WUOC closer to success. It does not permit for the conclusion that the UHOC had the right to break free from the "UNITE HERE constitutional prison".

225. With all of the above considerations in mind, the passage contained in paragraphs 103 and 104 of *Kvaerner Jaddco*, cited above, takes on a different meaning than that asserted by the WUOC. In that decision, the Board analysed the applicable constitutional provisions to determine the effect of the revocation of a local charter and determined that they were contradictory. The Board stated at paragraph 102 that the process that BACU had taken to constitute itself as an independent union was effective. The IUBAC had argued otherwise, asserting that its constitution and that of the local unions made those amendments ineffective.

226. The Board disagreed with that assertion, and said that *if* the theory of the BACU was correct, and the constitution provided that the BACU had been freed from its obligations under the IUBAC constitution because the IUBAC had unilaterally revoked the local charter, then the IUBAC could hardly be heard to complain that the previously chartered local union did not apply the terms of the international union's constitution when it subsequently made changes to its by-laws. The same result would hold in the instant proceedings if it had been determined that the constitution of UNITE HERE, properly interpreted, permitted for the conclusion that the UHOC continued to exist as an entity after its charter was revoked on March 13, 2009. But that is not the conclusion that I have reached in these proceedings. The UNITE HERE constitution provides for a different result. The analysis of the Board in *Kvaerner Jaddco* is premised upon an underlying finding that I have not reached in these proceedings.

227. In any event, it is quite clear that the passage of the Board relied upon by the WUOC was not critical to the Board's decision in *Kvaerner Jaddco*. In *Hyde Park Masonry Ltd.*, [2004] OLRB Rep. March/April 296, the same panel of the Board that determined *Kvaerner Jaddco* had the following to say about the argument regarding the revocation of the charters in the latter case, at paragraph 25:

> That argument was rejected in *Kvaerner Jaddco* on the basis that the effect of filing an application under section 147 was to freeze the status quo ante and that the purported revocation, whatever its legal effect might have been, was ineffective and not open to "acceptance" by the Ontario locals …

The result reached by the Board in *Kvaerner Jaddco* was based upon the filing of an application under section 147 of the Act. The Board never reached a conclusion regarding the legal effect of that revocation. Accordingly, at its highest the passage relied upon by the WUOC in these proceedings was clearly *obiter*.

### (d) *Is the WUOC a successor to the UHOC?*

228. In light of the findings made above, it is evident that the answer to the above-referenced question must be in the negative. On March 16, 2009, the former delegates to the UHOC met and purported to disaffiliate the UHOC from UNITE HERE. Based on my findings set out above, the resolution to disaffiliate had no legal effect. The UHOC at that time no longer existed. At that same meeting on March 16, 2009, the former UHOC delegates established the Ontario Council, adopted amended by-laws, and took sufficient steps to warrant the determination by the former Chair of the Board that the Ontario Council was a trade union for the purposes of the Act effective that date. I have no reason to doubt that determination.

229. Subsequently, the Ontario Council became affiliated with Workers United, and changed its name to the WUOC. As noted above, it is evident that the WUOC is the same trade union as the Ontario Council, but with a different name. However, for the reasons set out above, neither the WUOC nor the Ontario Council can be said to be a successor union to the UHOC. There has been no transfer of jurisdiction between UNITE HERE and the UHOC, and then, subsequently, from the UHOC to the Ontario Council and from the Ontario Council to the WUOC, that is in any way substantially compliant with the UNITE HERE constitution or the spirit of that constitution.

### (e) *Membership Support for Disaffiliation by the UHOC*

230. In light of my findings and conclusions set out above, it is unnecessary for the Board to deal with the question of whether the evidence identified sufficient membership support for disaffiliation by the UHOC.

## XIII. Further Observations

231. As noted above, there was considerable evidence offered by the parties regarding the efforts made by UNITE HERE to assert its position in Ontario after the meeting of the UHOC delegates that occurred on March 16, 2009. UNITE HERE waited for over seven weeks before it claimed that the WUOC did not have any right to represent employees in the more than 50 local unions affiliated with the UHOC. Since that time, the International has made little effort to establish an infrastructure to support the employees in those bargaining units should it be successful in these proceedings. Both Mr. Wilhelm and Mr. Clifford were optimistic that Local 75 could step up to manage those bargaining units, but it is evident that optimism and realism were some distance apart during the course of their testimony.

232. The WUOC relies upon this failure on the part of UNITE HERE to argue that the Board ought to find in its favour in these proceedings. It states that it is the only trade union party able to represent the more than 50 local bargaining units on a day-to-day basis, and that the Board cannot afford to ignore the "representational vacuum" that would be created by determining the question in dispute in favour of UNITE HERE.

233. This argument is one that might have been better made during the second part of these proceedings. However, I am prepared to consider it at this time.

234. On one level the position taken by the WUOC has some merit. As is often the case in this type of proceeding, the individuals primarily affected by the litigation are employees in local bargaining units who have found that many day-to-day labour relations matters have ground to a standstill until the Board can resolve the dispute. At the best of times these proceedings would take considerable time to adjudicate upon. Here, for reasons that are beyond the control of the Board or the parties, the first part of these proceedings took longer to complete than they normally would have taken. Accordingly, I appreciate the attractiveness of an assertion that the Board ought to be very hesitant to reach a conclusion that may have serious additional consequences on the bargaining unit members affected.

235. If the ability or effectiveness of the parties to service the bargaining units in question were a factor in determining these applications, the evidence establishes that the WUOC can better

service the units. That is simply because its staff members are currently doing so. If the Board were to rule that UNITE HERE has the better claim to represent the employees in question, a "representational vacuum" for a certain period of time is a very real possibility, a result that may well negatively affect the employees even further.

236. But that consideration ought not to influence the decision in the instant proceedings. UNITE HERE finds itself in the position it is in because the WUOC asserted that it was the same union as the UHOC and unilaterally asserted control over the "business" of the UHOC. In the face of a charter revocation that it initially believed to be unlawful, the leadership of the UHOC voted to disaffiliate where there was no evident constitutional authority to do so, asserted that it was entitled to walk away with the assets, contracts, funds, books and records of the UHOC, and asserted a claim over the bargaining rights of the local affiliates. I appreciate that the leadership of UNITE HERE was not focused upon the situation here in Ontario during March and April, 2009. As noted above, Mr. Wilhelm testified that he was busy attending to the damage being imposed upon the International by its then President, Mr. Raynor. I accept that evidence. I do not attribute to UNITE HERE the same degree of indifference to the bargaining units in Ontario as the WUOC does resulting from the seven week period that expired before counsel for UNITE HERE wrote to various employers in early May, 2009.

237. Since that time, the position taken by UNITE HERE has been that the WUOC ought to have delivered the assets, contracts, funds, books and records of the UHOC to it, established itself as a trade union on its own accord, and, during the open period of the collective agreement applicable to each of the various UNITE HERE local bargaining units, brought a displacement application for certification if it could establish support at the threshold required by the Act to support that application. The WUOC did not do that initially, although it has now brought numerous displacement applications in which it seeks to secure bargaining rights in those units notwithstanding its assertion that it is also the incumbent.

238. In my view, it would be problematic for the Board to determine that the question in issue ought to be answered in favour of the WUOC because of the potential "representational vacuum" that could result should there be a finding in favour of UNITE HERE. To do so would for all intents and purposes reward the WUOC for acting without authority. It certainly would create a significant moral hazard problem for the future. The fact that the WUOC has continued to service these units since March 13, 2009, and has effectively precluded UNITE HERE from doing so, to its detriment, cannot be a consideration in determining the question in dispute in these proceedings.

## XIV. Decision

239. For the reasons set out above, I find that the Workers United Ontario Council is not the same entity as, or the successor to, the UNITE HERE Ontario Council. As noted earlier, there is no dispute that the WUOC is a trade union for the purposes of the Act, and that it has been fulfilling the functions of a trade union since March 16, 2009. However, the WUOC is not the same union as the UHOC, or its successor.

## XV. Evidentiary Ruling

240. At the outset of the hearing before me counsel for UNITE HERE raised an issue with respect to the use of the transcripts of testimony that had been and would be prepared in these proceedings. The Board does not transcribe its proceedings. A party that requests the presence of a court reporter is typically subject to an order regarding the terms upon which a transcript may be prepared. In these proceedings, prior to the commencement of the initial 11 days of hearing the former Chair issued an order that set out the terms upon which UNITE HERE would be permitted to have a court reporter present to transcribe the evidence of witnesses.

241. Counsel for UNITE HERE indicated that his client proposed to make transcripts of the second round of hearings. He also indicated that his client was prepared to adhere to the terms previously set by the former Chair, with one exception. Amongst the terms of the previous order, the former Chair required counsel for UNITE HERE to provide a personal undertaking that the transcripts would only be used for the purposes of these proceedings. Counsel indicated that he was quite surprised to have been asked to give such an undertaking, and asked that he be relieved from complying with it. He also asked that his client be relieved from a term that it not utilize the transcripts for purposes other than these proceedings. Until I ruled on this question, counsel indicated that he was content to maintain the undertaking he previously made, and his client was equally content to comply with the order previously made by the former Chair.

242. Counsel for UNITE HERE argued that Board hearings were open, public hearings and that there was no legitimate reason why any transcript of a hearing day ought not to be available to be used for any reason outside of the hearing room. He noted that nothing could stop a third party from sitting in the hearing room, taking verbatim handwritten notes, and publicizing them to the world. In that context, counsel questioned how the Board could justify maintaining the prior term of the order in question and imposing that same term for the purpose of the second round of hearings. In counsel's view, if the transcript were to be offered for use in some other proceeding, it is the adjudicator in that proceeding that should determine whether the transcript could be put to the use sought.

243. In the highest tradition of advocacy, counsel for UNITE HERE provided a decision of the Board that imposed a similar order upon the parties where an employer intended to tape record testimony (see *Up-Rite Door Ltd.*, [1999] OLRD No. 619). However, no reasons for the term of the order were provided by the Board, and no solicitor's undertaking was required, as the employer appears to have been self-represented.

244. Counsel for the WUOC argued that his client's main concern was (and remained) that UNITE HERE would use the transcript in other proceedings, and that it ought not to be permitted to do so. Counsel submitted that the Board is the master of its own procedures and can quite properly set limits on the use of transcripts created by parties, keeping in mind that it is not the normal practice of the Board to permit the creation of such transcripts. Counsel for the WUOC indicated that the former Chair had ruled that the transcripts could not be used in any other proceeding or for any other purpose as part of his previous order. At his request, the Chair also required that counsel for UNITE HERE acknowledge that he was personally bound to the order not to use the transcripts beyond these proceedings.

245. Counsel for the WUOC argued that there was no reason to depart from the order imposed by the former Chair. He argued that although there were no reasons given for the prior ruling (the Chair was appointed to the bench before reasons were issued), the terms of the order imposed by the former Chair ought to stand having regard to the need for finality in labour relations matters. With respect to the second round of hearings, counsel argued that my ruling should be consistent with the ruling of the prior Chair. To do otherwise, it was submitted, would be to invite chaos. Counsel noted that it would be theoretically possible for one party to read into the evidence, and therefore to have recorded onto the transcripts of evidence prepared of the second round of hearings, the evidence that was offered in the first round of hearings, either for the purpose of asking a witness to adopt that testimony, or for the purpose of contradicting a witness. If my ruling were not the same as the former Chair's ruling, to read portions of the prior testimony to witnesses would effectively constitute a "work around" of the prior ruling.

246. I agree that any limitations on the use of the transcripts ought to be consistent amongst the first group of 11 transcripts, and the second group of four transcripts. It makes no sense to have different obligations applicable to the two sets of transcripts, particularly since what counsel for the WUOC anticipated might happen in fact occurred. During the second round of hearings witnesses were specifically referred to prior passages of their testimony to adopt, and were specifically referred to certain passages of their testimony for the purposes of challenging their testimonial credibility. Any order made with respect to the use of the transcripts must by necessity apply to all fifteen transcripts.

247. As a result of the former Chair's appointment to the bench I do not have the benefit of reviewing reasons for his decision to preclude the use of these transcripts beyond their use in this hearing, and for his decision to secure the personal undertaking of counsel for UNITE HERE that they would not be so used. Having given this question considerable thought, with all due respect I must admit that I have real concerns with the order issued by the former Chair.

248. Board proceedings, like court hearings, are open to the public. Open hearings are a critical underpinning of the court system in a democracy. Mr. Justice Bastarache recently made the following observation regarding the open court principle in *Named Person v. The Vancouver Sun*, [2007] 3 S.C.R. 253, at paragraphs 31 and 32:

> 31. The "open court principle" is a "hallmark of a democratic society", as this Court said in *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43, at para. 23. This principle, as the Court noted in that case, "has long been recognized as a cornerstone of the common law" (para. 24), and has been recognized as part of the law since as far back as *Scott v. Scott*, [1913] A.C. 417 (H.L.), and *Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322 (P.C.), where Lord Atkin wrote, at p. 355: "Justice is not a cloistered virtue". "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity" (J.H. Burton, ed., *Bentamiana: or, Select Extracts from the Works of Jeremy Bentham* (1843), at p. 115).
>
> 32. Open courts have several distinct benefits. Public access to the courts allows anyone who cares to know the opportunity to see "that justice is administered in a non-arbitrary manner according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 ("*CBC*"), at para. 22. An open court is more likely to be an

> independent and impartial court. Justice seen to be done is in that way justice more likely to be done. The openness of our courts is a "principal component" of their legitimacy: *Vancouver Sun*, at para. 25.

249. There is an implied undertaking applicable to parties to a Board proceeding that they will not use any documents produced in that proceeding in any other Board matter, unless those documents are otherwise legitimately available outside of the litigation process. That limitation on the use of documents produced by parties to litigation makes sense and is justifiable (see, for example, the discussion of this limitation in civil proceedings in *Goodman v. Rossi*, (1995) 24 O.R. (3d) 359 (OCA)). However, once a document produced by one party to another as part of pre-hearing production in a Board proceeding becomes an exhibit at a Board hearing, the implied undertaking ends (see *Maxi*, [1998] OLRB Rep. May/June 448, at paragraph 13, and *Marsil Mechanical Inc*., Board File 3591-98-G, unreported decision dated July 9, 1999, at paragraph 35). The disclosure of the document in a public forum usually precludes any ongoing need for confidentiality.

250. To permit a party to prepare a transcript of testimony given in a Board proceeding and then to entirely preclude its use outside of the Board proceeding for which it was produced does not address a legitimate concern similar to the implied undertaking discussed above. The testimony, like the disclosure of documents that become exhibits, has been made in open hearing. Precluding the use of the transcripts of testimony outside these Board proceedings would only serve to partially close the doors of the hearing room. A personal undertaking required from counsel that imposes that same limitation has identical effect. If such an order were permitted to stand, it would not be a large leap for a party to seek an order from the Board precluding individuals who take verbatim or close to verbatim notes at hearings from disclosing those notes to the public at large. The doors of the hearing room would close even further.

251. Counsel for the WUOC argued that his client's concern was that the transcript might be used for the purposes of other litigation proceedings that were at that time ongoing in both the United States and Canada. Although that litigation has now ended, counsel for the WUOC maintained his position during final argument. It is unclear to me why such a possibility is properly characterized as a "concern". The presumption going into a hearing is that all witnesses will testify honestly and to the best of their ability. Presumably that was not a concern for any witness in these proceedings. Does the existence of a transcript provide the other party with a "free discovery" of its witnesses? Yes, but that result occurs whether a transcript is produced or not. If any witness for the WUOC or UNITE HERE were to testify to a given fact, and he or she were to testify otherwise before a different tribunal, the other party could challenge that witness in the absence of a transcript and establish the inconsistent statement by calling as a witness any person who had been in attendance at the Board hearing, had heard the initial testimony of the witness, and was prepared to testify to what he or she had heard. In an open court or hearing room all of what is said can be listened to and recorded by hand. Accordingly, it is the act of a witness testifying that provides the other party with the "free discovery" for the purposes of another proceeding. The only thing that the generation of a transcript does is to make it easier to establish an inconsistent statement, because only the court reporter needs to be called to establish the accuracy of the transcript. Of course, the benefit of a "free discovery" accrues to all parties. Here, the WUOC secured a "free discovery" of both Mr. Wilhelm and Mr. Clifford.

252. Taking into account of all of these considerations, I am not prepared to replicate the term of the order made by the former Chair that counsel for UNITE HERE provide a personal undertaking that the transcripts would only be used for the purposes of these proceedings, and that UNITE HERE not utilize the transcripts for purposes other than these proceedings.

253. Section 114(1) of the Act provides the Board with broad authority to reconsider its prior decisions. The Board has this authority even if the original panel of the Board that made the decision in question is no longer able to act (see, for example, *EKT Industries Inc*., [1987] OLRB Rep. May 696). In accordance with section 114(1) of the Act, and for the reasons set out above, I revoke the term of the prior ruling that UNITE HERE not be permitted to utilize the transcripts of these proceedings for purposes other than these proceedings. I also relieve counsel for UNITE HERE from his personal undertaking that the transcripts of these proceedings would only be used for the purposes of these proceedings.

## XVI. Next Steps

254. As noted above, the determination of the question answered by this decision was identified by the parties as being the first part of a two part process. The second part of the process requires consideration of the location of the bargaining rights previously held by the UHOC. Having regard to the conclusions reached in this decision, there is a legitimate question raised as to whether there is any need to litigate the second part of these proceedings.

255. In the circumstances, I refer these proceedings to the Manager of Field Services who is authorized to appoint an Officer to confer with the parties to determine whether it is possible to finally resolve these proceedings without the need for further litigation and, if not, to determine how that litigation may be structured so as to be completed as quickly as possible. Keeping in mind the various delays incurred in litigating these proceedings to date, I am prepared to make myself available to the parties by way of conference call if necessary.

256. I remain seized of these proceedings.

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## **3382-06-HS** Toronto Police Association, Applicant v. **Toronto Police Services Board** and Christopher Lynch, Inspector, Responding Parties

**Health and Safety – The Toronto Police Association appealed an inspector's decision that the Toronto Police Services Board had not failed to take every precaution reasonable in the circumstances through the implementation of TPSB's mandatory name tag policy for members, while in uniform – The TPA argued there was an increased risk of psychological and physical harm due to today's electronic environment availability where this information can lead to access to addresses, telephone numbers and other personal information – On reviewing the history of the issue, the legal framework, other ways officers' names become known to the public, and specific incidents, among other matters, the Board determined whether the TPSB had taken every precaution reasonable in the circumstances, given the particular circumstances of the TPS which includes the fact that policing is an inherently dangerous profession; that during the course of their duties officer's**

**names become known to members of the public in a myriad of ways apart from name tags; and that the presence of name tags has not increased the risk of harm to officers from organized crime; and that neither the frequency nor severity of threats from mentally ill persons has increased as a result of the use of name tags – Given that the evidence did not establish that the wearing of name tags was related to any material increase in risk, the Board dismissed the appeal – Appeal dismissed**

**BEFORE:** *Ian Anderson*, Vice-Chair.

**APPEARANCES:** *Beth Symes, Ben Millard,* and *Larry Molyneaux* appeared for the Toronto Police Association; *Ian Solomon, Michael Martosh, Amandi Esonwanne, Kim Derry*, and *Christine Bortkewicz* appeared for the Toronto Police Services Board; *David McCaskill, Bruce Arnott*, and *Christopher Lynch* appeared for the Inspector.

**DECISION OF THE BOARD:** December 20, 2010

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**Introduction**

1. In 2006 the Toronto Police Services Board ("TPSB") introduced a mandatory requirement that while in uniform members of the Toronto Police Services ("TPS") wear name badges displaying their first initial and last name. The Toronto Police Association took the position that in doing so the Toronto Police Services Board failed to "take every precaution reasonable in the circumstances for the protection of a worker" as required by section 25(2)(h) of the *Occupational Health and Safety Act* (the "Act"). Inspector Christopher Lynch of the Occupational Health and Safety Branch of the Ministry of Labour disagreed. The Toronto Police Association ("TPA") appeals that decision to this Board pursuant to section 61 of the Act.

2. Summarily stated, the TPA's position is that the name badges increase the risk of harm to members of the police service in two ways. First, the name badge, or the subsequently introduced cloth name tag, identifies officers by name. It notes that in today's electronic environment, a name can be used to determine an officer's home address, telephone numbers and other personal information. The TPA argues that organized crime, bikers, stalkers and other individuals wishing to harm officers can and do use this information to stalk, threaten and harm officers and their families. As a result of wearing name tags, the TPA argues, officers and their families are at an increased risk of psychological and physical harm. Further, this aspect of the risk of name tags, it argues, disproportionately endangers the health and safety of officers who are female and/or from ethnic and religious minorities.

3. At the core of this argument is the proposition, examined more fully below, that risk is the product of the probability of an event occurring and the harm that would result if the event occurs. The TPA argues the "event" is that individuals who wish officers harm will obtain personal information and use it to stalk those officers and their families. The "harm" which would result if this was to occur is severe. Thus, the TPA argues, a small increase in the "probability" that this event will occur constitutes a significant increase in the risk of harm to members of the police services. A name tag makes it that much easier to obtain home addresses and other personal information of members of the police services. That is, it increases the probability that this information will be obtained. In the result, the TPA argues, the TPSB's policy of mandatory name tags increases the risk of the event of stalking of members of the police services and thereby violates the TPSB's obligation under the Act to take every precaution reasonable in the circumstances for the protection of those workers.

4. The second way in which the TPA asserts that the name badge policy increases the risk of harm to members of the police service relates to the material used for the name badges. When the policy was first introduced, the name badges provided to members of the police services by the employer were made of a shiny golden coloured metal. These name badges were affixed to the

officer's uniforms by means of a pin. The TPA argues that the metal name badges give rise to a risk of physical injury and may be used as a weapon or target by those who wish officers harm.

5. The TPSB argues that the TPA has failed to prove that the employer's name badge policy has resulted in any material increase in the risk of harm to police officers. It notes that its obligation is to take every reasonable precaution in the circumstances. The relevant circumstances include the fact that policing is an inherently dangerous activity, the fact that the employer has policies in place to protect the safety of members of the police services and the fact that members of the police services are required to provide and do provide their names to members of the public in a number of ways that existed prior to the introduction of the name tag policy and continue to exist today. Much of the evidence relied upon by the TPA predates the introduction of the name badge policy. There is no evidence, the TPSB argues, a name obtained from a name badge or tag has been used for the purposes of causing a member of the police services harm.

6. With respect to the risk of harm associated with metal name badges, the TPSB rejects many of TPA's concerns as lacking foundation. In any event, it notes that it now provides members of the police services with cloth name tags which are attached to their uniforms by means of Velcro. Metal name badges are only required to be worn on dress uniforms.

7. The Inspector notes that the risk to a member of the police services arises from possession of the member's name. A name tag or badge is merely a means by which the name may be learned. Revelation of an officer's name to members of the public is an essential part of a police officer's job in a free and democratic society. To the extent that revelation of an officer's name creates a risk, the employer's policies mean that it is largely a manageable risk. Any increase in risk to members of the police services as a result of the name badge policy is, on the evidence, so insignificant as not to constitute a breach of the Act.

8. I note that while the employer's initial policy was one of mandatory name badges, it is now one of mandatory name tags or badges. The use of cloth name tags predominates. In this decision, therefore, I will generally refer to the policy in question as the "name tag policy". It is also worth noting at the outset that the name tag policy is supplemental to the long standing obligation of uniformed officers to at all times wear their badge numbers on their outer garments.

## Background

9. Much of the background giving rise to the issue on appeal is more fully described in an Agreed Statement of Facts as follows:

> 1. A Central Joint Health and Safety Committee was established on September 18, 2003 pursuant to an agreement between the Toronto Police Services Board (the "Board") and the Toronto Police Association. Terms of Reference for the Structure and Function of the Central Joint Committee were established. The Ministry of Labour approved the Central Joint Committee as a non-traditional health and safety committee in accordance with s. 9(3.1) of the *Occupational Health and Safety Act*. The Central Joint Committee has responsibility for health and safety matters that are common to more than one workplace.

2. The Ontario Human Rights Commission released a report on racial profiling entitled "Paying the Price: The Human Cost of Racial Profiling" in December 2003. Among other recommendations, the OHRC suggested one of the best practices to avoid racial profiling is that "police officers and private security guards should wear name badges that are clearly displayed". The Report does not consider or discuss health and safety issues.

3. At its meeting of March 8, 2005 (Minute #P71), the Respondent passed a motion approving of the concept of name badges, or other identification on uniforms, in principle.

4. The Honourable Justice Patrick LeSage, the former Chief Justice of the Superior Court of Ontario, wrote a report entitled, "Report on the Police Complaints System in Ontario" in April 2005 for the Attorney General of Ontario. In this report, LeSage canvassed the systemic barriers that exist to accessing the public complaint system against the police and concluded that police officers should be required to wear name tags so that members of the public are able to easily identify them. The Report does not consider or discuss health and safety issues.

5. The Government of Ontario introduced Bill 103 to deal with the recommendations of the LeSage Report. Bill 103 did not include the wearing of name tags.

6. At its meeting of June 13, 2005 (Minute #P197), the Respondent received a status update. The Chief advised the Board that the Service had established September 2005 as the target date for providing the Board with a report identifying the approximate costs related to the purchase of nametags or other identification as well as providing the Board with samples of the potential nametags/identification.

7. At its meeting of September 6, 2005 (Minute #P289), the Board approved funding for the purchase of name tags to be worn by Toronto police officers. A sample name tag was displayed to the Board. The name tags identified the officer by his or her first initial and surname.

8. On October 6, 2005 the Association filed detailed submissions to the Central Joint Committee taking the position that police officers would face enhanced risk if they were required to wear name tags.

9. The issue of name tags as it related to health and safety was on the agenda of the Central Joint Committee at its meetings of October 6, November 10, December 16, 2005 and January 27, March 27, April 20 and May 31, 2006.

10. At the meeting of the Central Joint Committee on July 6, 2006, Dr. Mukherjee tabled the report of Chief William Blair dated June 5, 2006.

11. At the July 6th meeting, the members of the Central Joint Committee discussed the health and safety issues of wearing name tags. The

Association took the position that for health and safety reasons, name badges should be worn only on a voluntary basis.

12. At its meeting July 10, 2006 (Minute #P1 98), the Board received the Chief's June 5, 2006 report entitled, "Name Badges - Occupational Health and Safety Act.". The Board directed the Chief of Police to ensure that all employees of the Toronto Police Service wear name badges by December 31, 2006 and that any necessary by-laws or practices be amended accordingly.

13. On August 1, 2006 counsel for the Association filed an occupational health and safety complaint to the Regional Director of the Central Region of the Ministry of Labour and asked the Ministry to appoint an inspector.

14. By routine order dated September 7, 2006, the Chief directed that the Board's decision to implement name tags be completed by December 31, 2006. Toronto Police cadets began wearing name tags on September 7, 2006. Name tags were issued to Toronto Police employees thereafter and by December 31, 2006 name tags were being worn on the uniform of all members of the Toronto Police Service.

15. The Board, through the Acting Manager, Occupational Health and Safety, provided an information package to the Ministry under cover of letter dated October 13, 2006.

16. In November 2006 separate health and safety complaints were filed by employees who had been injured by wearing name badges and by other employees who claimed that they had been threatened with harm. The Ministry directed that these new allegations be addressed by the Central Committee.

17. The Association responded to the Board's October 13, 2006 correspondence to the Ministry by letter dated November 30, 2006.

18. The Central Joint Committee met on December 4, 2006 to discuss the health and safety issues of wearing name tags. Consensus was not achieved and, pursuant to the Terms of Reference, the parties agreed to ask the Ministry of Labour to appoint a safety inspector.

19. The Ministry appointed Christopher Lynch, a Safety Inspector, to investigate the complaints. Lynch met with the Central Joint Committee on January 4, 2007 and dismissed the complaints. Lynch said that there was no evidence that wearing a name badge has caused an injury beyond minor scratches or cuts. The Inspector refused to issue an Order.

20. The Association appealed to the Ontario Labour Relations Board from the decision of Inspector Lynch dated January 4, 2007.

## The Process Leading up to the Adoption of the Name Tag Policy

10. Evidence and argument were addressed to the process by which the name tag policy was adopted. It is convenient to address those issues now.

11. The TPA led evidence with respect to various meetings where the issue of the name tag policy was discussed prior to its adoption by the TPSB. In particular, there were discussions at the Ontario Police Health and Safety Committee, a committee, with province-wide membership, established under section 21 of the Act to provide assistance or advice to the Minister of Labour.

12. There were also discussions at the TPS Central Joint Health and Safety Committee ("CJHSC") established in accordance with s. 9(3.1) of the Act. Larry Molyneaux is the employee co-chair of the CJHSC; the Chair of the TPSB, Dr. Alok Mukherjee, is the employer co-chair of the CJHSC. Mr. Molyneaux testified that while no direct assurance had been given, he had assumed, based on statements made by Dr. Mukherjee at CJHSC meetings, that name tags would be introduced on a voluntary basis. Mr. Molyneaux agreed that he felt "blindsided" when the TPSB adopted the policy of mandatory name tags.

13. None of this evidence is relevant to the issue before me. The Ontario Police Health and Safety Committee provides advice or assistance to the Minister, not the employer. Nor are the deliberations, or even the decisions, of the CJHSC relevant. As stated in *Ontario (Ministry of Health and Long-Term Care, Land Ambulance Programs)*, [2010] OLRB Rep. January/February 108 at para 228:

> .... The OHSA does contemplate that when a workplace requires a joint health and safety committee, the committee may make recommendations to the employer for the improvement of the health and safety of workers (section 9(18)(b)), to which the employer is required to respond in writing. The employer, however, may either respond providing a timetable for implementation (section 9(20)) or respond that it does not accept the recommendation and set out its reasons (section 9(21)). Ultimately the decision is that of the employer, subject to an order by an Inspector or this Board.

## Chief Blair's Report and the Decision of the TPSB

14. As noted above, in March 2005 the TPSB adopted a motion approving in principle the use of name badges for police officers. In November 2005 the TPSB requested that Chief Blair provide it with a report advising on its responsibility under the Act as it related to the use of name badges (the "Report" or "Chief Blair's Report"). Chief Blair was subsequently specifically directed to address thirteen (13) questions. The Report which was provided addressed all of those questions. Many of the questions asked of Chief Blair relate to factual issues addressed elsewhere in this decision. It is useful, however, to discuss two of those questions at this time, as they are referenced directly in the Conclusion section of the Report. Chief Blair was asked to address:

> The experience of other police services in Ontario, Canada, and the United States with the use of name badges. Are there any services that have recently introduced name badges? If so, has this resulted in an upsurge in threats or harassment of officers or their families?
>
> The experience of other professionals with the use of name badges, e.g. corrections officers, mental health professionals etc.

15. In addressing these issues, Chief Blair caused surveys to be sent to twenty six (26) police services or other agencies in Canada and the United States. Thirteen responses were received, in relation to twelve police services: California Highway Patrol; Durham Regional Police Service; Florida Highway Patrol; Fredericton Police Service; London Police Service; Niagara Regional Police Service; Ontario Provincial Police; Peel Regional Police Service; Vancouver Police Service; Waterloo Regional Police Service; Winnipeg Police Services (the Winnipeg Police Association also filed a response); and York Regional Police Services. Of these, all but Niagara Regional Police Services, Peel Regional Police Services, Winnipeg Police Services and the Ontario Provincial Police required police officers to wear name tags/badges on outer wear. The Ontario Provincial Police had initially introduced name tags on a mandatory basis, but then made them optional as discussed elsewhere in this decision. The Report indicates that the Florida Highway Patrol has had legislatively mandated name badges since 1939 and that there were no reported incidents of its members being harassed because of badges.

16. The Report also contains information with respect to the policies and experiences of some of the non-responding police services and agencies, as well as those of some agencies and services not surveyed. Some of this latter information appears to have been based on a submission made by the TPA to the CJHSC in October, 2005. The TPA introduced additional evidence with respect to the policies and experiences of some police services and agencies which will be reviewed elsewhere in this decision. For present purposes it is sufficient to note that in the main body of the Report, in addressing the experience of "other professionals", reference is made specifically to the policies of the Ontario Nurses Association, the Centre for Addiction and Mental Health and the policy of Air Canada, which was described as having been negotiated through a bargaining process with the Canadian Union of Public Employees, Airline Division.

17. The Report states Chief Blair's conclusion as follows:

> Conclusion:
>
> If the objective of wearing name badges is to ensure member accountability, there are no known circumstances where a member could not be identified through the use of a badge number.
>
> There is no objective evidence from the police agencies whose members are wearing name badges that demonstrates any enhanced level of risk under the *Occupational Health and Safety Act* or similar legislation. Research did reveal instances of employee harassment within other professions that was attributed to the information displayed on the name badge.
>
> The question then becomes, does the duty under Section 25(2) (h) of the *Occupational Health and Safety Act* to take every precaution reasonable in the circumstances to protect a worker apply in this instance. Reasonableness has several definitions including "in accordance with reason; not absurd", "within the limits of reason; not greatly more or less than might be expected" (Concise Oxford Dictionary). "Reasonable" in the context of occupational health and safety concerns is based on predictability through empirical data, not speculative information or conjecture.
>
> Clearly no one wishes to wait until "something" happens before action is taken. However, the absence of objective empirical data from police services

> whose uniform members wear name badges may be indicative that these services have not experienced threats, harassment, and/or the stalking of their members as a direct result of the visibility of name badges. The fact that many services were unable to reveal details surrounding the harassment of their members may[1] indicate that incidents were the result of the victim being a member of a police service, as opposed to the displaying of name badges. As such, it is possible that any concerns that associate the use of name badges with the automatic harassment of members may be speculative at best.
>
> Member safety is the joint responsibility of the individual and the employer. Just as the employer must be diligent with regards to harassment issues, individual members must also take every precaution necessary to protect themselves and their families. As illustrated in this report, technological advances have minimized the effort required to locate personal information.
>
> If the Board approves going ahead with the implementation of name badges, it is my suggestion that name badges be introduced on a voluntary basis. This approach is consistent with the research conducted in Ontario in 2005, where the majority of those surveyed[2] supported a choice for the individual officer. Implementation should include a reasonable period of time to allow for sufficient determination of the impact to Toronto Police Service members. It is well documented that policing in Toronto is unique, and the circumstances faced by members may differ from that of other jurisdictions. This time would also assist in preparing the organization for the introduction of the badges through communication and member education initiatives.
>
> Finally, should the Board implement name badges, I suggest that this identification display the member's first initial and last name, and be issued as an item of optional wear by uniform police officers and uniform civilian members. This format will satisfy the need for identification, while limiting the display of personal information.
>
> The Service will continue to monitor external threats against members and in the event a negative correlation between name badges and member safety is identified, appropriate action will be taken, including notifying the Board and its members of the circumstances.

18. TPA describes the risk assessment performed by Chief Blair as objective. It appears to assert that because Chief Blair suggested that name badges be introduced on a voluntary basis, his Report must be taken as having concluded that the introduction of name badges on a mandatory basis posed a risk. I do not agree that the Report is capable of supporting this assertion. As set out above, the conclusion in the Report plainly states:

> There is no objective evidence from the police agencies whose members are wearing name badges that demonstrates any enhanced level of risk under the *Occupational Health and Safety Act* or similar legislation.

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[1] Emphasis in original.

[2] This is a reference to the results of a "poll" of 600 Ontario adults conducted on behalf of the Police Association of Ontario between September 15 and 20, 2005 described elsewhere in Chief Blair's Report.

It is the case, however, that Chief Blair "suggested" that name badges be initially implemented on a voluntary, not mandatory, basis.

19. At its meeting of July 10, 2006, the TPSB received Chief Blair's Report. The TPSB decided to implement name tags on a mandatory basis. The minutes of the meeting record no explanation as to why the TPSB reached a decision contrary to the recommendation. Deputy Chief of Police Kim Derry, who was present at the meeting, recalled that the report was discussed and that the TPSB decided to make the wearing of name tags mandatory, but could not remember any of the specifics of the discussion.

20. During the course of the hearing, I suggested that in the absence of evidence from a member of the TPSB, and in particular Dr. Mukherjee, as to how it reached its decision, in light of Chief Blair's report an adverse inference might be drawn. The TPSB did not call any member of the TPSB as a witness. The TPA relies upon this fact in its final argument. Having considered the submissions of the parties, I am now persuaded for the reasons argued by counsel for TPSB that nothing turns on the failure of the TPSB to call such a witness.

21. The TPSB is a municipal police services "board", the existence and role of which is mandated by the *Police Services Act*. Section 31(1) of the *Police Services Act* provides in part:

> A board is responsible for the provision of adequate and effective police services in the municipality and shall,
>
> ....
>
> (c) establish policies for the effective management of the police force;

22. Section 41(1)(a) of the *Police Services Act* provides that the duties of a chief of police include:

> in the case of a municipal police force, administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the board under section 31(1).

23. Section 34 of the *Police Services Act* permits a municipal police services board to delegate to two or more of its members some of the authority conferred upon it by the *Police Services Act*. There is no suggestion that the TPSB has done so in this case. Further, to the extent that the question is with respect to the actions or statements of Dr. Mukherjee at the CJHSC, he was acting alone and could not have been exercising any such delegated authority.

24. In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, at issue was the validity of summons to members of Sarnia council, issued in order to compel them to give evidence with respect to the basis for a council resolution establishing an inquiry. The Supreme Court of Canada upheld the decisions of the lower courts quashing the summons, stating (at paragraph 45):

> The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts.

25. The TPA argues that when the TPSB acts as an employer it cannot shelter behind its status as a statutory body to say that it is not accountable for its decisions. With respect, in my view this misstates the issue. There is no question that the TPSB is accountable under the Act for its decisions as an employer. The issue is whether there is anything to be gained by having one or more of the board members give evidence as to the reasons why the board made the decision. Each such member could only give evidence with respect to his or her own reasons. Different board members may have voted for, or against, adopting the policy of mandatory name tags for entirely different reasons. These are the practical reasons which underlie the principle of law stated by the Supreme Court of Canada in *Consortium Developments (Clearwater) Ltd.*

26. In any event, ultimately what matters in this case is not why the TPSB made the decision it made, but whether the implementation of that decision is contrary to the Act.

## The Legal Framework

27. I turn now to the legal framework against which the evidence adduced is to be assessed.

28. While this is an appeal from the decision of the Inspector, all parties agree that the proceedings before the Board are a hearing *de novo*. That is, this Board answers the question on the basis of evidence and submissions made to it. The decision of the Inspector is not in any way binding upon this Board. Further, all parties agree that the onus is upon the Toronto Police Association ("TPA") to prove that the mandatory requirement by the Toronto Police Services Board ("TPSB") that members of the Toronto Police Services ("TPS" or "police service") wear name tags is contrary to the Act.

29. Section 25(2)(h) of the Act provides:

> (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> ...
>
> (h) take every precaution reasonable in the circumstances for the protection of a worker.

30. There is no dispute with respect to certain general principles. The Act is a remedial statute intended to protect the health and safety of workers. It is to be generously interpreted in a manner that furthers the health and safety objectives of the Act. Narrow or technical interpretations that would interfere with the purpose of the Act are to be avoided. See: *R. v. City of Hamilton*, [2002] O.J. No. 283 (C.A.). The employer's duty under section 25(2)(h) is broad and undeniably strict: *R. v. Wyssen*, [1992] OJ. N0. 1917 (C.A.).

31. The workplace parties agree that whether an employer has taken every precaution reasonable in the circumstances requires an objective assessment. It is not a question of whether or not the employer or the workers subjectively anticipated that there was, or was not, a risk: *R. v. Canada Brick* [2005] O.J. No. 2978 (OSCJ) at paragraphs 147 and 148.

32. The words "in the circumstances" require that the context of a specific workplace be taken into account before determining whether the employer took "every precaution reasonable": *R. v. Brampton Brick Ltd.*, [2004] O.J. No. 3025 at paragraph 18; *Skyjack Inc.*, [2007] O.L.R.B. Rep. Jan./Feb. 191 at paragraph 33.

33. The employer's obligation is not to take every precaution, but every precaution which is reasonable in the circumstances, not some broader notion of acting reasonably: *R. v. Brampton Brick Ltd.*, [2004] O.J. No. 3025 (C.A.), at paragraph 18; *Ontario (Ministry of Transportation)*, [2006] OLRB Rep. Mar. /Apr. 196 at paragraph 146. An employer is not required to guarantee a worker's health and safety against all possible or conceivable risks, no matter how remote they may be: *Ontario (Ministry of Community and Social Services) (Anger Grievance)*, [2008] O.G.S.B.A. No. 173 at paragraph 15. It may not be possible to guarantee that there will be no risk: *General Motors of Canada Ltd.*, [1999] O.O.H.S.A.D. No. 101 at paragraph 36.

34. The TPA notes that no prior adverse incident is required in order to engage the duty, citing *Ontario (Ministry of Public Safety and Security) v. Schill et al.*, [2003] O.O.H.S.A.D. No. 105 at paragraph 14; *Ontario (Ministry of Labour) v. Taggart Construction Ltd.*, [2007] O.J. No. 5328 (OCJ) at paragraph 47. While this is undoubtedly correct, this does not eliminate the need for some evidence or facts upon which to make an objective assessment.

35. In this respect, I note that *Ontario (Ministry of Labour) v. Taggart Construction Ltd.*, simply held that a "solid safety record does not satisfy the required standard to make out a due diligence defence .... Instead, the defendant must show it took all reasonable precautions in the circumstances to avoid the particular event." *Ontario (Ministry of Public Safety and Security) v. Schill et al.* was a case dealing with a request for the interim suspension of an inspector's order pursuant to section 61(7) pending the hearing of an appeal of the order. The Board's determination in interim suspension cases is perforce not made on the basis of a full evidentiary record. In rejecting the employer's argument that there was no evidence that the workers in question would be exposed to risk if the order was suspended the Board stated:

> The Board is entitled to take administrative notice of plain and obvious facts and matters within its expertise. No prior adverse incident is necessary to involve the protection of the Act. In another context, one need not wait for a worker to be electrocuted to justify an order that hoisting equipment not be permitted within close proximity to a high-voltage power line. The absence of a prior incident does not necessarily lead to the conclusion that there is no risk to worker safety: *Krazies Kar Clinic*, [1999] OLRB Rep. Jan. /Feb. 63.

Thus, while there was no evidence of a prior incident involving the specific workplace parties, the Board was satisfied on the basis of "plain and obvious facts and matters within its expertise" that suspension of the order would likely endanger the health and safety of the workers.

36. In my view, similar principles apply to the hearing of an appeal itself. The Board may rely on plain and obvious facts and matters within its expertise for the purposes of determining that a course of conduct gives rise to an unacceptable risk. Thus, "an order that hoisting equipment not be permitted within close proximity to a high-voltage power line" would likely be upheld on appeal without the necessity of proving that electrocution would result if contact were made. The activity is inherently and patently risky. The same cannot be said, however, of the wearing of a name tag. The risk to members of the police service must be proved.

37. The TPA argues that both the magnitude of the risk and its frequency are relevant considerations, citing *Ontario (Ministry of Transportation)* at para. 147. It also makes reference to *Ontario (Ministry of Community and Social Services) (Anger Grievance)*, [2008] O.G.S.B.A. No. 173. I note that *Ontario (Ministry of Transport)* cites *Intercept Security Services*, [1998] O.O.H.S.A.D. No. 159 for this proposition, as does *Ontario (Ministry of Community and Social Services) (Anger Grievance)*. Subject to the caution expressed in *Ontario (Ministry of Transport)* at paragraph 151 that the Board must be cautious about engaging in a purely statistical exercise, I agree with this proposition.

38. No one disputes that the harm which could be experienced by members of the police service if they are stalked, threatened or assaulted is real and severe. As noted by the TPA in argument, the TPSB has a number of policies and practices addressed to reducing the likelihood that these events will occur. These practices and policies constitute tacit, and often express, recognition by the employer of the severity of the risk that such events pose to members of the TPS.

39. The issue, however, is whether the TPA has established that the employer's name tag policy increases the frequency of that event occurring. The TPA argues that the event is that individuals who wish officers harm will obtain personal information and use it to stalk or otherwise harm those officers and their families. Clearly name tags constitute a means by which such an individual can learn the name of an officer. Further, there can be little serious debate that with a name a great deal of personal information can be relatively easily obtained through the internet. But it does not necessarily follow that the number or identity of officers stalked or otherwise harmed will change as a result of name tags. Put differently, the question is whether the absence of name tags constituted a deterrent to some in the past or whether the presence of name tags serves to encourage others in the present. That is, has the TPA proved that the frequency of officers being stalked or otherwise harmed has increased as a result of name tags to such a degree as to constitute a violation of the Act?

40. While at the outset of its oral argument, the TPA accepted that an employer's obligation is not to guarantee the health and safety of employees against all possible or conceivable risks no matter how remote, the balance of its argument appears to be at odds with this proposition. The TPA seems to assert that given the severity of the prospective harm, the TPSB was required to rescind its name tag policy if that policy had the effect of increasing the frequency of harm even incrementally.

41. It is useful to review the cases cited earlier which reference both the magnitude of the risk and its frequency in considering whether there was a breach of section 25(2)(h) of the Act: *Ontario (Ministry of Transport), Intercept Security Services* and the *Anger Grievance*.

42. In *Ontario (Ministry of Transportation)* the event was the possibility that truck drivers would assault Transportation Enforcement Officers (TEOs) in the course of their duties. The harm was the physical and psychological injuries the TEOs could sustain as a result. The TEOs' union took the position that TEOs should be issued with pepper spray in order to reduce the frequency of an assault occurring. The Board was not convinced that issuing the pepper spray would have this effect since among other things its use would require the TEOs to engage with enraged truck drivers rather than disengaging as contemplated by other policies of the employer. Put differently,

the Board was not convinced that the remedy requested would reduce the frequency of the event which was at issue.

43. In *Intercept Security Services*, at issue was whether the employer's decision to equip the security guards it employed with revolvers rather than semi-automatic weapons constituted a breach of section 25(2)(h) of the Act. The event was the possibility that the security officers would be confronted by an armed assailant. The harm was the prospect of serious injury or death to the security guard. The Adjudicator concluded that a semi-automatic weapon would be superior. Nonetheless, the Adjudicator concluded that the applicant "did not provide sufficient evidence to establish that security guards face armed assailants with any kind of frequency". In this respect, it is worth noting that the evidence before the Adjudicator was of three reported incidents among all security guards in Ontario in the preceding three years and some anecdotal evidence. The Adjudicator thus concluded that "if security guards are faced with an armed assailant, they are at great risk, but that the likelihood they will be faced with that risk is small". In the result, notwithstanding the determination that the semi-automatic weapons were superior, the Adjudicator determined that there was no breach of section 25(2)(h) of the Act.

44. In the *Anger Grievance* at issue was the design of the reception desk in an office responsible for administering the Ontario Disability Support Program (ODSP). The event identified was the possibility that ODSP clients might leap or lunge across the desk or otherwise assault staff members. The employer had agreed to make the desks larger, creating an obstruction to assault, but declined to erect a plexi-glass barrier. The harm was the prospect of injury to staff members. The Grievance Settlement Board found that the employer had not failed to fulfill its obligations under section 25(2)(h) of the Act. The Board noted that under the Act an employer "does not have to take steps to guarantee an employee's health against all possible conceivable risks, no matter how remote they may be" (at paragraph 15). The Board was not satisfied that the union had established sufficient frequency of the event occurring. It stated in part (at paragraph 25):

> The clients served suffer from mental and/or physical disabilities. I accept that, from time to time, clients may become frustrated, upset or annoyed at the need to comply with requirements relating to the initial claim for assistance and/or the continued receipt of benefits. These emotions, for example, could be triggered by an employee request for additional information or by a client's failure to receive a benefits cheque. As a consequence, ODSP staff may periodically have to deal and interact with persons who act in a disruptive, inappropriate and unpredictable manner. I am left, however, with the distinct impression that the vast majority of clients do not conduct themselves in this fashion. In this regard, as previously mentioned, the Union filed some twenty-eight (28) incident reports of what was perceived to be threatening or disruptive behaviour occurring from and after November 2005. I consider it material that in the period 2004 to 2007 inclusive, some eight-six thousand (86,000) clients were served in the Windsor ODSP Office.

The Board continued by examining the reported incidents themselves and was reinforced in its view that the risk of harm was low.

45. What is striking is that in each of these cases the frequency of the event was considered too low to trigger the employer's obligation under section 25(2)(h), notwithstanding the fact that the harm which would result if the event occurred was considered severe (and indeed, similar to the harm of concern in this case). While this is not a purely statistical exercise and I will examine the evidence with respect to harm in greater detail below, it is, I think, useful to observe that the TPA led evidence with respect to only nine incidents of threats or harassment of members of the police service by name after the introduction of the name tag policies. During the time period covered by this evidence there would have been at least one million police - community contacts. This is far below the frequency of incidents found not to give rise to a breach of section 25(2)(h) in the *Anger Grievance.*

46. The TPA, however, formulates the proposition in its main argument slightly differently from the proposition that both the magnitude of risk and its frequency are relevant considerations. Risk, it says, is the product of the probability of an event occurring and the harm that would result if the event occurs.

47. As pointed out in the testimony of Dr. Klassen, one of the expert witnesses heard by the Board, this formulation is potentially problematic. Frequency and imminence, among other factors, may also be relevant to the assessment of risk. I illustrate the concern in this manner. Probability is a measure of the likelihood that a given outcome will happen on each occasion that something happens. For example, there is a 50% chance that "heads" will appear when a coin is tossed. Assume that "heads" gives rise to some form of harm which one wishes to avoid. In order to assess the risk of that harm arising, one would also want to know the frequency with which the coin is tossed. It is quite a different thing if the coin is never tossed, or tossed only once every year, than it is if the coin is tossed every minute. Further, if the coin is tossed only at infrequent intervals, one would want to know how soon the next coin tossing will be.

48. Another layer of complexity is as follows. Assume that the frequency with which the coin is tossed and the imminence of the next coin tossing are not known with certainty but also can only be described in terms of probability. It is one thing if one knows with certainty that the annual coin tossing is to take place tomorrow: one would probably wish to prohibit coin tossing tomorrow because a fifty percent chance of harm is too high. It is another if one only knows that there is some probability that the coin will be tossed tomorrow, and that probability is very low.

49. This highlights a potential difficulty arising from the use of the term "frequency". Frequency can be used to connote a regular cycle, such as a radio signal. Understood in this way, it conveys a sense of predictability. However, frequency as used in the *Ontario (Ministry of Transportation), Intercept Security Services* and the *Anger Grievance* is not used in this sense. Rather it is used to describe the number of times that something was observed to have happened over a certain number of interactions recorded in a particular period of time. For example, in the *Anger Grievance* the Board observed that there were 28 incidents "after November 2005" and some 86,000 clients served during the period 2004 to 2007 inclusive. If one were to assume that the two periods of time were the same, then on average there was one incident for approximately every 3,000 clients served. This does not mean that every 3,000th client served there was an incident: it may have been that the 28 incidents arose from the last 28 clients served of the 86,000. More significantly, this average frequency does not provide a basis for predicting in the future which client interactions will give rise to an incident.

50. Within the workplace, higher or lesser degrees of certainty can attach to the frequency of events. For example, if it is known that a wheel in a machine has a defective cog which will cause an accident when it is engaged, an employer would likely be required to repair or replace the wheel, even if it the cog will only be engaged one time in 3,000 (the speed of rotation, as well as other factors, may of course also be relevant). In the absence of such a repair, it is a certainty that the defective cog will be engaged and that an accident will ensue. By contrast, the *Ontario (Ministry of Transportation), Intercept Security Services* and the *Anger Grievance* are all examples of cases in which uncertainty attaches to the frequency of the events, as well as to their imminence and the harm which might ensue. For example in the situation described in the *Anger Grievance*, uncertainty attaches to the identification of a client who might react negatively to a staff member, the circumstances which might cause that client to do so (some of which, for example whether an individual had eaten or taken their medications that day, will be entirely independent of the individual's experience within the ODSP office), the extent of the client's actions and the degree of harm caused to the staff member as a result. It is an event of uncertain occurrence with uncertain outcomes, only some of which are harmful, the average frequency of which, based on past experience, is very low.

51. An approach which requires elimination of any increase in probability of such uncertain events quickly leads to absurdities. For example, a daily circle check of a vehicle reduces the frequency of catastrophic accident as a result of some defect such as an oil leak or a deflated tire. Since oil leaks and deflation of tires can occur over the course of the day during which the vehicle is then operated, hourly circle checks would further reduce this risk, and presumably checks every ten minutes would reduce the risk even more. The absurdity is patent.

52. I also note that if an employer is obliged to adopt a particular policy or practice in order to meet its duty to take every precaution reasonable in the circumstances for the protection of a worker, then presumably the employer is also obliged to enforce those polices or practices, including disciplining workers who breach them if appropriate. As applied to this case, the logic of the TPA's argument requires not only that the employer rescind its mandatory tag policy, but it must prohibit the voluntary wearing of name tags by members of the TPS. The potential for this discipline is one measure of the degree of risk which the TPA must establish in order to succeed in this case.

53. I do note that the TPA argued in the alternative that the wearing of name tags be made voluntary. In order for the TPA to succeed with this argument it must establish not only that there are risks from the wearing of name tags, but that those risks can and will be identified by individual officers in advance so that the officer may appropriately decide whether or not to wear his or her name tag.

54. Finally, the intersection between an employer's duty to accommodate for human rights purposes and an employer's obligation to take every precaution reasonable in the circumstances for the protection of a worker may provide some guidance as to the degree of risk giving rise to the latter obligation. In this respect, I note for example that in *Frito-Lay Canada Ltee.*, (1990), 11 L.A.C. (4th) 41 (Frumkin), the arbitrator held that an employer may not hold a disabled employee out of service without "concrete proof that the employee, by reason of his physical condition, is unable to perform his functions, or that there exists a real, tangible and highly probable risk to the safety and security of the employee himself, to his fellow employees or to those with whom he comes into contact in his work". It may be, however, that different considerations apply with

respect to the voluntary assumption of risk by the employee in such a circumstance compared to a case in which the risk arises from an employer mandated policy or practice. As these points were not argued before me, I will not consider them further. In any event, the principles otherwise reviewed in this section are sufficient for determination of this case.

55. With these principles in mind, I turn now to consider the facts of this case, beginning with the specific circumstances of this workplace. I will describe the composition of the TPS, the policing experience and the manner and degree to which police officers' names became known to members of the public apart from name tags.

**The Composition of the Toronto Police Services and the Prevalence of Name Tags**

56. It is useful at the outset to describe the composition of the TPS. In doing so, I will identify which members are now required to wear name tags.

57. The TPS consists of approximately 5,500 officers and 2,200 civilian members. Collectively they are referred to as members of the police service. On any given day approximately 80% of those working are in uniform. Officers and civilian members of the TPS are only required to wear a name tag while in uniform.

58. The TPS is divided into three Commands. Under the Divisional Policing Command, uniformed officers may be working in a Primary Response Unit, a Community Response Unit, a Traffic Response Unit, an Alternate Response Unit, in an administrative group or as a "booker" responsible for operating the jail cell at a police station. Civilian members of the force who assist with administration and front desk activities at each station also wear uniforms, although different from those worn by officers, and are required to wear a name tag. Other uniformed officers, who are required to wear name tags, are Scenes of Crime Officers. Officers assigned to Plain Clothes duties do not wear name tags. These include Investigative Officers assigned to the Criminal Investigation Bureau, Major Crimes Unit Officers and most officers assigned to the Youth Bureau. Officers can and do rotate through these units so that an officer may be in uniform and wearing a name tag for six months followed by six months in plain clothes not wearing a uniform.

59. Under the Specialized Operations Command, there are officers in Detective Services, who are mostly not in uniform and hence not wearing name tags, and officers in Operational Services, who are mostly in uniform and hence wearing name tags. Operational Services includes Court Services and Parking Enforcement.

60. Officers in Executive Command wear uniforms and name tags. Civilian members are not uniformed and do not. The Administrative Command has one uniformed officer. The Human Resources Command has a number of uniformed officers involved in internal training and external community mobilization.

61. In addition, officers performing "paid duty" assignments, i.e. duties which have been privately contracted for, are required to wear their uniforms and hence their name tags.

## The Experience of Being a Police Officer

62. The TPS filed statistical information which illustrates the risks faced by police officers in the daily course of their duties. The TPS keeps track of selected offences committed against police officers in a given year. The offences are attempted murder, aggravated assault, assault with weapon or causing bodily harm, assault, assault police officer, assault to resist arrest and dangerous operation of a motor vehicle causing bodily harm. From 2003 to 2007 the total of these offences increased from 1,116 to 1,729 per year.

63. The TPS also filed statistical data with respect to the number of complaints made against police officers on an annual basis over the same period 2003 to 2007: 735 complaints were made in 2003, followed by an increase in complaints, but with 686 complaints made in 2007.

64. Larry Molyneaux was called as a witness by the TPA. Mr. Molyneaux is the Director of Member Benefits for the TPA. He was first elected as an officer of the TPA in 2004. Mr. Molyneaux had been a member of the TPS from 1981: two years as a cadet followed by twenty years as an officer. Mr. Molyneaux had performed the functions of a uniformed officer in marked car, an officer on the beat, station officer behind the front desk and worked undercover in plain clothes. He had also worked as a detective. He was promoted to the rank of uniformed sergeant in 1992. In 1998 he was transferred as a sergeant to the Charles O. Bick College, the police college of the TPS where members do in-house training, to train new recruits.

65. Mr. Molyneaux testified that as a police officer he had been personally threatened a number of times. This included threats from mentally unstable individuals. Most of these threats he considered to be idle. Two or three times he wondered if the threat was going to be carried out. (There was no suggestion in Mr. Molyneaux's evidence that any of these personal threats was in fact ever carried out.) Mr. Molyneaux testified that he felt able to deal with the threats made against him: he had his training and he had a firearm. However, the possibility of harm to his family members preyed on his mind and made him worried.

66. Mr. Molyneaux testified that he was not concerned that the average person, who, for example, made a threat upon receiving a parking ticket, was going to search for his home address or phone number. His concern had to do with members of organized crime because these groups are sophisticated and have resources.

67. Don Wilson was called as a witness by the TPA. Mr. Wilson was a member of the TPS from 1970 until 2006: two years as a cadet followed by 34 years as an officer. Mr. Wilson had progressed through the ranks, serving both as a uniformed staff sergeant, with responsibility for the uniformed officers at a division, and as a detective. In 2003, the TPS created the Technological Crime Unit in Intelligence Services. Mr. Wilson and another officer were appointed the co-heads of the Unit when it was created. When the other officer retired, Mr. Wilson continued as the sole head until his retirement in April 2006. It is to be noted that Mr. Wilson retired prior to the introduction of the name tag policy by the TPSB.

68. Mr. Wilson gave evidence with respect to gangs and organized crime which I will review below. It is convenient, however, to review here his evidence in relation to the policing experience in general.

69. Mr. Wilson testified as to the range of threats to officers he had investigated during his career as a police officer with the TPS. There were instances of graffiti threatening an officer by name or badge number. On several occasions his division received phone call threats to officers. Mr. Wilson described the nature of these threats as lots of intoxicated callers, often angry with police as a result of some incident on the street. He had also investigated threatening calls made to officers at their homes.

70. During his period of employment as a police officer, threats by emails were not very common. He was aware of threats to former Chief Fantino and other officers. He expressed the opinion that they were more common today. On the occasion that he investigated an email threat to an officer, a suspect was identified, arrested and charged.

71. He had also investigated two incidents of damage to police officers' vehicles. The evidence was unclear as to whether these were personal vehicles or marked police vehicles. The first incident took place outside a court house; the second outside a police station. There was no suggestion in his evidence that the vehicles had been specifically targeted because they were used by or belonged to a specific officer who had been identified by name.

72. Mr. Wilson testified that where an officer had been threatened by name, a lot of times his investigation revealed that the name had been learned through the arrest process or when the officer testified in court.

73. Mr. Wilson testified that he had been personally verbally or physically threatened while he was a police officer on a number of occasions. He testified that in the majority of these incidents the person was intoxicated or extremely angry when they made the threat. They were, in his opinion, just "spur of the moment" threats. There was only one occasion when he caused charges to be laid as a result of a threat.

74. In cross examination, Mr. Wilson agreed that it was a fact of life that police officers receive threats and this has always been true, including prior to the introduction of name tags. He agreed that for the most part such threats are made in the heat of the moment and further that the bulk if not all threats arose from some specific interaction between the officer and the individual involved, in the form of the arrest process, the issuance of a traffic ticket, testimony at a criminal trial or the like. He also testified that if an individual had an officer's badge number, the officer's name could be obtained by calling the officer's division or police head quarters.

75. Deputy Chief of Police Kim Derry was called as a witness by the TSPB. Deputy Derry joined the TPS in 1973 at the age of 18 as a civilian member. He became a police officer as soon as his age permitted it, in 1976. Deputy Derry worked for five years as a uniformed constable walking a beat in Regent Park. This was followed by a period on a drug squad, promotion to uniformed sergeant, periods as detective sergeant on the hold up squad and on the forgery squad, promotion to duty inspector, unit commander, staff superintendent and ultimately deputy chief of police.

76. Deputy Derry testified that he had been threatened by name himself. He testified that police officers engage with the public, and that includes "undesirables". During that engagement police officers will sometimes be verbally threatened or challenged: that is part of walking a beat.

77. This part of the evidence lends itself to the following conclusions. Police officers in the TPS have been and are subjected to threats. These threats predate the introduction of name tags. This includes threats from individuals with mental health problems. The vast majority of all of these threats, however, are, and are seen by the officer involved, as idle. In particular, threats made by members of the general public in the heat of the moment are generally idle. Of much more significant concern are threats made by members of organized crime, including biker groups. I will return to the evidence with respect to these groups below.

## Community Policing

78. The *Police Services Act* mandates community policing. Section 41 of the *Police Services Act* provides in part as follows:

> (1) The duties of a chief of police include,
>
> (a) in the case of a municipal police force, administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the board under subsection 31 (1);
>
> (b) ensuring that members of the police force carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;
>
> (c) ensuring that the police force provides community-oriented police services;
>
> (d) administering the complaints system in accordance with Part V.

Deputy Derry testified that the TPSB has established a policy of community policing. The Chief of Police has adopted a number of strategies designed to accomplish this objective. Community Officers are assigned to specific neighbourhoods and are expected to build rapport with the communities to which they are assigned. Part of the way in which officers do this is by introducing themselves to members of the community. The objective is to build a positive relationship of trust, respect, integrity and reliability. As argued by the TPSB, this forms part of the "circumstances" within which the reasonableness of its actions must be assessed.

## The Obligation of Police Officers to Provide Their Names if Asked

79. Apart from community policing, it has long been the policy of the TPS that if a uniformed officer is asked for his or her name, then he or she is required to provide it. Failure to do so is, therefore, a breach of the TPS Rules. An officer who failed to do so could be charged under the *Police Services Act* with disobeying a lawful order.

80. Mr. Molyneaux's testimony was that in all of his years of policing he could only recall one occasion when he was asked for his name. Rather he testified "it was always the badge number: give me your badge number". He stated that he had been asked for his name when answering the phone in a police station. As noted elsewhere in this decision, TPS rules require that phones are to be answered by providing one's name and badge number.

81. Deputy Derry testified in cross examination that he had only been asked for his name (as opposed to volunteering it) on a few occasions over the years. Deputy Derry testified that notwithstanding the TPS rules, in some confrontational situations he would expect officers to use their "common sense" and not provide their names if asked. Mr. Molyneaux described one such situation he was in while on foot patrol in the Jane and Finch area. As of the date of the hearing of this matter, no officer had ever been disciplined for failing to provide his or her name.

82. Public demonstrations constitute a particular subset of potentially confrontational situations.

83. Mr. Molyneaux testified that historically police officers were trained to communicate with members of the crowd in non-hostile situations, but not in hostile situations. If a police officer were asked for his or her name in a hostile situation they were trained not to provide it. Mr. Molyneaux himself had provided such training to officers. Mr. Molyneaux testified, however, that at all times, including in hostile situations, police officers were identifiable by their badge numbers.

84. Deputy Derry essentially agreed with Mr. Molyneaux's description of police response to hostile and non-hostile crowds. Indeed, Deputy Derry had been trained by Mr. Molyneaux on this issue.

85. Deputy Derry testified that the general approach of "Public Order" Units, i.e. units assigned to deal with demonstrations, has also changed over the years from one of confrontation to interacting with demonstrators to try and create a friendlier atmosphere. Ninety-eight per cent of demonstrations go off without incident. In cross examination Deputy Derry conceded that in a demonstration which had turned into a riot he would not expect an officer to provide his or her name if asked. He specifically denied, however, that, for example, in a demonstration arising from the dispute between Serbs and Kosovars, an officer with an identifiably Kosovar name would be at risk from the Serbs. The officer, he testified, would clearly be identified, might be taunted or even sworn at, but he did not accept that constitutes placing the officer at risk.

86. This evidence establishes that in certain confrontational situations officers of the TPS who declined to provide their names were not subjected to discipline by the employer. The TPA relies on that fact and states that name tags effectively take away the discretion of officers to refuse to provide their names in such circumstances. It argues, therefore, that name tags place an officer at risk in those situations.

87. This argument presupposes that the reason officers historically did not provide their names in confrontational situations was that the provision of the name per se placed the officer at risk. That was not the evidence before the Board. Mr. Molyneaux testified that in a hostile situation, dialogue between the front line officer and the crowd stops. He said the reason for this was that if an officer is talking to a member of the crowd, then the officer does not have peripheral vision (by which presumably he meant that an officer does not pay attention to his or her peripheral vision) and is therefore at risk of being hurt by pepper spray or projectiles thrown by members of the crowd. Deputy Derry, in cross examination, agreed with the suggestion by the TPA that in a situation which has gotten out of control an officer would not be giving out his or her name, because the officer would be focusing on gaining control of the situation, not responding to questions. There is no evidence before the Board that officers decline to provide

their names in confrontational situations because provision of the name per se placed the officer at risk of anything other than taunts.

**Other Ways in Which Names of Officers Become Known to the Public**

88. Upon request, the TPS provides officers with business cards for distribution to members of the public in the course of their duties. The business cards show an officer's first and last name in full, badge number, rank, division and division address and phone number. Over 4,000 officers have ordered these cards. In cross examination Deputy Derry agreed that officers are not required to hand out their business cards: that it is a matter within their discretion.

89. Deputy Derry testified as to a number of scenarios in which officers would identify themselves to members of the public in the course of their duties. This includes during the course of investigating a potential crime scene, domestic violence scenarios or neighbourhood disputes and the execution of search warrants.

90. Officers' signature (or in a few instances initials), badge number and unit also appear on a number of documents which they create and give to members of the public during the course of their duties: Collision Reporting Centre Referral Forms; Tow Cards; Parking Tickets; Certificate of Offence under the Provincial Offences Act; Summons to Defendant; Notice of Suspension of Driver's Licence; Appearance Notice Issued by Peace Officer; Record of Arrest / Apprehension / Unconditional Release / Appearance Notice / Summons Application / Provincial Offences; Supplementary Record of Arrest (etc.); Property Receipts. Of these documents, the officer's name, in addition to the officer's signature or initials, appears on Certificate of Offence under the Provincial Offences Act and on Record of Arrest / Apprehension / Unconditional Release / Appearance Notice / Summons Application / Provincial Offences. In addition, an officer's name, but not signature or initials, appears on Motor Vehicle Accident Reports. In cross examination, Deputy Derry agreed that an officer's signature on one of these documents may be hard to read, with the result that it would be difficult to tell the officer's name from his or her signature.

91. Officers' names may also appear in Crown disclosure briefs. With respect to disclosure of documents, in some instances, the Crown requires counsel for the accused to sign an undertaking which provides among other things that at no time is the accused to have possession of the documents unless under the direct supervision of counsel or his/her designate from counsel's office. I note that such an undertaking would not preclude an accused from taking note of the names of police officers listed in the brief. Irrespective of the undertaking, Deputy Derry testified that he has seen accused individuals in jails with copies of the entire Crown disclosure brief.

92. The rules of TPS require that when a member answers a phone within the TPS, they shall give their unit, rank and name in that order.

93. Undercover officers do not, of course, wear name tags or provide their real names when asked. Undercover officers undergo extensive training. Police services borrow officers from each other for the purposes of this work. But even undercover officers are required to provide their names if they testify in court.

94. Investigative officers will identify themselves to potential informants in an attempt to develop rapport. Similarly, Community Response Unit officers will engage gang members and become known to them by name.

95. Police officers have identification cards (called "warrant cards") which show their names, albeit the size of the font is such that it may not be easy to read at a distance. In a police building, non-uniformed officers are required to wear their identification cards on their outer clothing in a clearly visible and identifiable manner. Outside a police building, non-uniformed officers are required to immediately produce their badge and identification card when identifying themselves in an official capacity. At crime scenes, they will also wear their identification cards on their outer clothing in a clearly visible and identifiable manner.

### Badge Numbers

96. Uniformed officers have long been required to wear their badge number on their uniform. Those badge numbers were originally metal, worn on the epaulets of officers' uniforms and on their hats. The metal numbers were affixed by means of a pin. The metal numbers would fall off so the TPS has moved to embroidered numbers. In addition, as is clear from the preceding section, the badge numbers of police officers appear on a variety of policing documents.

97. The rules of the TPS require that if a member of the public calls a police station, provides the badge number for an officer and asks for his or her name, the name must be provided. Mr. Molyneaux testified that his personal practice would be to direct the caller to attend at the station in person in order to obtain this information. His practice was not shared by other witnesses asked about this issue. Mr. Wilson testified that when he received such calls as the duty officer at a station, he provided the identity of the officer in accordance with the rules of the TPS. Deputy Derry also testified that the duty officer will provide the name of the officer, although he stated it may only be the last name of the officer.

98. I also note that Chief Blair's Report indicates that in an attempt to ascertain what information could be obtained with a badge number, a female officer was provided with a list of ten badge numbers and told to call the associated divisions and ask for the officer's first and last name and mailing address, while posing as a member of the public wishing to send the officer a "thank-you" card. In nine cases she was given this information. In the tenth, she was given the mailing address and the officer's last name but only the initial of his or her first name.

99. On the evidence before me, I am satisfied that if a member of the public has the badge number for an officer of the TPS, they may, by making a phone call, obtain the officer's name.

### Conclusions With Respect to the Degree to Which Officers' Names are Otherwise Known to Members of the Public

100. The TPA argues that prior to the name tag policy officers effectively had discretion as to whether or not to disclose their names. Clearly the rules of the TPSB provide that when an officer is asked for his or her name they must provide it. Equally clearly, the evidence established that there were certain limited circumstances in which an officer would not be disciplined for failing to do so. To this extent, it is true that name tags take away a certain limited amount of discretion which officers had as to when and whether to disclose their names.

101. On the evidence before me, however, I conclude that quite apart from name tags there are a number of ways in which the names of police officers become known to members of the public. This includes the disclosure of their names by officers themselves during the course of their duties, notably the community policing activities described above. It also includes responses to inquiries based on knowing the badge number of the officer. Uniformed officers are required to wear their badge numbers at all times. The badge number also appears on the various policing documents described above. The name of the officer can thus be obtained even if it does not otherwise appear on the document or the officer's signature is illegible.

102. Further, the performance of the duties of a police officer requires this level of disclosure of the officer's name. This constitutes part of the circumstances against which the reasonableness of the requirement that members of the TPS wear name tags must be assessed.

**TPS Risk Reduction Strategies**

103. The TPS has an optional Address Suppression Program in which members of the service may chose to participate. Approximately 20% have done so.

104. It also has a policy for addressing "External Threats Against Service Members". The document commences:

> Rationale
>
> Members of the Toronto Police Services, during the course of their duties, may receive or become aware of a threat being communicated to themselves, a member of their family, or another member of the Service or that member's family.
>
> The likelihood of job-related threats resulting in physical harm to the member is generally low. However remote, the Service recognizes that the possibility does exist and has implemented several initiatives to assist members in recognizing the risk and provide suggestions or precautions that could reduce the risk of harm to themselves, as well as to their families.

105. The procedures in the "External Threats" policy are communicated to police service members. The policy recognizes different levels of threat. The policy provides that members "shall" report threats against themselves, their family or another TPS member to their supervisor. The member may be directed to the Employee and Family Assistance Program, an investigation may be initiated or both. Some threats trigger a risk assessment. Recommendations may be made to the member. The TPS pays the cost of implementing the recommendations.

106. The TPS and the TPA jointly produced a document for all members of the TPS entitled "Member Personal Safety Issues". The document provides tips on personal safety issues, including advice on vehicle registration, altering travel patterns, personal telephone listings, disclosure of personal addresses on documents such as cheques, shredding of old bills and receipts, participation in surveys, steps to take while absent on vacation, and advising family members not to acknowledge that they are related to a police officer.

107. As noted, the TPS has put in place a number of strategies designed to reduce the ability of someone who intends harm to police officers to use the license plate of their vehicle for this purpose. The potential for harm arises from the fact that, upon payment of a nominal fee, anyone can obtain from the Ministry of Transport the name and address of the owner of a license plate. The TPS's address suppression program allows members of the TPS to use the police station as their home address for the purposes of registering the licence with the Ministry of Transport. Further, the employer has erected fences around the parking lots at its police stations where members park their cars and attempts by anyone to record in any manner licence numbers is perceived as suspicious behaviour triggering "Officer Safety Bulletins" and challenge or any apprehension of individuals suspected of doing so.

108. The TPS circulates "Officer Safety Bulletins" to alert members of specific threats or suspicious activity. This includes individuals who appear to be attempting to photograph the personal vehicles of police officers.

109. The TPA argues that in these documents the employer has recognized the risk to TPS members from the disclosure of personal information to members of the public who may wish to threaten or harm officers or their families. It notes that one of the Officer Safety Bulletins originating from TPS Intelligence Services refers to attempts by members of a known Tamil gang to videotape a police facility and the personal cars of officers at that facility as "an extremely serious threat", where the emphasis was supplied by Intelligence Services. Further, it notes that Deputy Derry conceded in cross examination that the reason for these documents is that the TPS is concerned that individuals who wish police officers harm will use the license numbers to obtain the home address of a police officer and with that address the officer, and her family, could be at risk.

110. As stated earlier in this decision, there really is no dispute that the harm which could be experienced by members of the police service if they are stalked, threatened or assaulted is real and severe. The issue is the frequency with which that harm is realized and the extent, if any, to which name tags change that frequency. The "External Threats" policy, which predates name tags, describes the likelihood of harm as "generally low". The Officer Safety Bulletin cited by the TPA is directed to a particular gang related attempt to obtain personal information. It is apparent that the gang was not deterred by the fact that police officers do not wear name tags: it simply pursued other strategies in an attempt to obtain the personal information it sought. Specifically, it sought to record the licence number of a car.

111. These documents, then, are consistent with the undisputed fact that the employer recognizes that the harm which could be experienced by members of the police service if they are stalked, threatened or assaulted is real and severe. However, the employer's risk prevention or reduction policies and practices reflected in these documents, are also part of the circumstances within which the reasonableness of the employer's precautions to protect the health and safety of its workers must be assessed, and more particularly within which the reasonableness of its mandatory name tag policy must be assessed.

**The Specific Incidents**

112. The TPA led evidence of a number of specific incidents. They fall into three broad categories. Some of the incidents arise within the TPS, but pre-dated the name tag policy. In

general, the TPA relies on these incidents to demonstrate the severity of harm which can be caused by individuals who obtain personal information and use it to stalk or otherwise harm those officers and their families. Some of the incidents arise in the TPS but post-date the name tag policy. In general, the TPA relies on these incidents to demonstrate the potential severity of harm, but also to argue that the name tag policy has resulted in that harm being realized. The TPA also led evidence with respect to incidents outside the TPS. I organize my description of this evidence within these three broad categories. On the agreement of the parties, the names of individuals accused of committing offences have been omitted.

**Pre-Name Tag TPS Incidents**

113. As noted, in general, the TPA relies on these incidents to demonstrate the severity of harm which can be caused by individuals who obtain personal information and use it to stalk or otherwise harm those officers and their families. Equally, however, these incidents serve to demonstrate that such harm occurs even when police officers are not wearing name tags. It is useful, however, to consider the degree to which the presence of a name tag would have made a difference in the likelihood of the event.

114. The Board received affidavit evidence from Charlene DiDaneli. Ms. DiDaneli was a police officer with the TPS from 1988 until 2004. Ms. DiDaneli described two incidents, each involving a different individual.

115. In 1993, a man attended at the police station to which Ms. DiDaneli, then Bailey, was assigned. He delivered a letter addressed to “Charlene Bailey”. In the letter the man threatened to rape her. The man was charged with threatening bodily harm. Ms. DiDaneli believes that she had encountered this man while working undercover in a prostitution investigation. She had arrested him at that time. She understands that he would have been given a “Form 9”, which would have included her name, as part of the Crown disclosure.

116. In 1995, Ms. DiDaneli, now married, was contacted by TPS investigators working out of the sexual assault unit. They advised Ms. DiDaneli that they had been investigating ND for a serious sexual assault. In the course of their investigations, they found a rape kit and handwritten notes which included a detailed description of a bizarre sexual fantasy involving “Charlene Bailey” and ND. The document contained a list referring to, among others “an off duty police woman, 25” (Ms. DiDaneli’s approximate age at the time), “all abducted and raped at gun point”. The document also included a description of weaponry, including a “silenced dart gun/tranquilizer gun”. Ms. DiDaneli has no knowledge of how ND came to know her name: there is no record of her having arrested him. She was extremely shocked and disturbed by what she was told and shown. She had no further involvement with the investigation. Later in 1995, ND was convicted of sexually assaulting a 17 year old girl.

117. In or around February 2003 Ms. DiDaneli became aware that ND had been arrested for the sexual assault and murder of Lisa Posluns. Ms. DiDaneli was struck by the striking similarity in appearance between herself and Ms. Posluns. She became extremely upset and distressed.

118. Both these incidents caused Ms. DiDaneli great distress and fear. She feels great stress and worry about her safety when ND is released from prison.

119. In cross examination, Deputy Derry agreed that if Ms. DiDaneli had been an investigator investigating a sexual predator like ND, had known his history, and had refused to give her name to ND she probably would not have faced any discipline. He agreed that by requiring Ms. DiDaneli to wear a name tag, this discretion would be taken away. Whatever other cogency this hypothetical may have, it is important to note that investigators are in plain clothes: they do not wear name tags.

120. Name tags are irrelevant to both of these events. In the 1993 incident, Ms. DiDaneli had been working undercover, and hence would not have been wearing a name tag. Further, the individual would have obtained Ms. DiDaneli's name from the Crown disclosure brief in any event. In the 1995 incident, Ms. DiDaneli had no known prior contact with ND. A name tag, therefore, would not appear to have made a difference. This incident, however, is discussed further below in the section dealing with expert psychiatric evidence with respect to stalking.

121. The Board received affidavit evidence from Officer Jennifer Thompson. Officer Thompson is a steward with the TPA. Officer Thompson described three incidents, two of which pre-date the name tag policy and the last of which post dates it and will be discussed below. I note that following the introduction of the name tag policy, the TPA actively solicited reports of incidents from its members. Officer Thompson's descriptions appear to have been provided in response to this request.

122. From 1995 to 2000, Officer Thompson was a court officer, assigned to escort prisoners to and from their cells.

123. In or around 1996-1998, Officer Thompson had occasion to escort an adult male prisoner, AS. AS made repeated inappropriate comments and sexual advances at Officer Thompson and on a number of occasions requested her home telephone number. She eventually provided AS with a false name, and advised her co-workers that if anyone called looking for someone by that name they should advise her. There is no evidence before me that Officer Thompson was ever advised that such a call was ever made. On two occasions thereafter, AS approached Officer Thompson at the Court House and asked her to go out with him. On both occasions, Officer Thompson said no and asked AS to leave her alone. She felt extremely uncomfortable and vulnerable on both occasions. Officer Thompson believes that if AS had obtained her name, he would have attempted to contact her at home.

124. In or around 1996-1998, Officer Thompson also had occasion to escort prisoner AF, to and from the court house. AF was charged with extortion. The trial did not proceed, and the charges were stayed, because the key witness was murdered on his way to court. Officer Thompson encountered AF on two occasions thereafter. The first was some six months later. She went to a bar with some friends and observed that AF was present. AF continuously sent drinks to her table which she refused. She felt fearful and uncomfortable. Approximately one and half years later, Officer Thompson was walking on the street outside the Princess of Wales theatre with her aunt. AF emerged from an alley and walked directly towards her. He asked her if she wanted to go for a drink. She refused and walked quickly away. Officer Thompson felt extremely frightened and uncomfortable. She feared for the safety of herself and of her aunt. She feared that AF was following her. Officer Thompson believes that if AF had obtained her name, he would have attempted to contact her at home and that his stalking and harassment of her would escalate.

125. Officer Thompson states that these incidents caused her great distress and fear. While she participates in the address suppression system offered by the employer, she is afraid that with her name a determined individual would be able to use the internet to find out personal information about her, including her home address and phone number. She is fearful of being threatened, harassed or physically harmed because she is a female police officer. As a result she goes to great lengths to hide the fact that she is a police officer. She feels more threatened as a result of having to wear a name tag.

126. Would name tags have made a difference in these incidents? AS would have known Officer Thompson's name, rather than having to ask for it. I note, however, that notwithstanding Officer Thompson's belief that AS would have attempted to contact her at home had he known her real name, there was no evidence that AS, or anyone else, ever called the court house and requested personal information about the officer with the false name provided by Officer Thompson.

127. Similarly, Officer Thompson believes that had AF known her name he would have contacted her at home and his stalking and harassment of her would have escalated. However, notwithstanding her subjective perception of these events some years after the fact, there is no suggestion that Officer Thompson ever reported either the incidents involving AF, or the incidents involving AS, to her supervisor or that Officer Thompson ever sought to have charges laid against AF, or AS. Objectively, it is far from clear that either AS or AF would have become stalkers, or indeed that the encounters with AF were anything other than chance. These incidents are also discussed further below in the section dealing with expert psychiatric evidence with respect to stalking.

128. Evidence was filed with respect to several incidents involving an individual identified as "DM". On November 18, 1998, officers from 41 Division attended at DM's residence to assist the Children's Aid Society in removing DM's child as a person in need of protection. During this incident, DM was observed to be cursing and ranting. At one point, he turned to one police officer and stated: "Get off my property or I will kill you. I've beaten up cops before and I'll see you in Hell." A warrant for apprehension of the child was obtained. Emergency Task Forces attended. During the ensuing altercation, DM exited his house holding his 6 year old son in front of himself and daring police to shoot him. He was eventually subdued and transported for a psychiatric assessment. While in the psychiatric ward DM said to a nurse: "If I get out of the restraints, I'm gonna get a gun and come back and kill all of you here." DM was charged with threatening bodily harm, assault and threatening death. The disposition of the charges is not in evidence before me.

129. On June 8, 2002, DM pulled up to the emergency exit of a hospital at approximately 4:00 AM. He said to an attendant who happened to be present:

> You better not hurt my six year old daughter (son)? This is the worst hospital in Toronto. Are you guys from 41 Division?

When the attendant advised DM that he was not a police officer but an ambulance attendant, DM continued:

> Well, you better tell those fuckers that I am going to kill all of them at 41 Division. Tell all of the officers at 41 Division that they are all fucking dead! Those fuckers are dead for hurting my six year old daughter (son)!

DM then sped off. The incident was reported to the police. An "Information Bulletin" was issued by 41 Division alerting officers of the threat. DM's residence was staked out. On June 11, 2002, DM was arrested by Emergency Task Force officers without incident. He was charged with uttering death threats. The disposition of the charge is not in evidence before me.

130. In November 2003, DM was charged in relation to harassing phone calls he had made from February to November 2003 to a psychiatric nurse at a hospital at which he was receiving treatment. He was arrested by members of the Emergency Task Force on November 8, 2003. He resisted arrest and a taser was used to subdue him. The disposition of the charge is not in evidence before me.

131. DM's behaviour was reactive and irrational. As discussed further below in the section dealing with expert psychiatric evidence with respect to stalking, there is no basis to think that the presence of name tags would have affected that behaviour.

132. Evidence was filed with respect to an incident in May 2001 involving HW and Officer Lisa Cowling. In addition the Board received the evidence of Officer Cowling by means of affidavit.

133. HW was a serial sex offender with a violent past. On several occasions he was observed lurking in or around the building in which Officer Cowling and another female police officer had apartments. On one occasion he had been lurking in the laundry room of the building when he observed a car pull up driven by another off duty female officer who happened to have come to visit Officer Cowling. HW climbed out of a window and rushed to the driver's window of the car. HW asked the officer if she was one of the female police officer that lived in the building. HW told the officer that she had no reason to fear him and that he knew that an officer named "Lisa" lived in the building. HW asked the officer for Officer Cowling's apartment number. The officer did not answer HW, but later advised Officer Cowling of the incident. The next day the other female police officer who lived in the building was approached by HW as she was leaving. HW repeatedly asked her if she was one of the female officers who lived in the building. HW also asked about Officer Cowling, using both her first and last names. This officer also told Officer Cowling about the incident. Officer Cowling reported the incidents to the TPS. They were investigated and HW was determined to pose a credible threat. An Officer Safety Bulletin was issued about HW and the threat which he posed to female police officers. HW was subsequently arrested, charged and convicted of criminal harassment.

134. Officer Cowling described the impact of these events on her. She has no knowledge of how HW came to learn her first and last name and where she lived. She had never met him. She stated that she was extremely shaken and fearful after being advised of the first incident and shocked and frightened after being advised of the second incident. She felt unsafe about returning to her apartment. The Threat Assessment recommended that she change her phone number and stay away from her residence. She moved in with friends on a temporary basis. Subsequently she permanently moved out of the building which caused a huge and unwanted disruption in her life. The incidents caused her great distress and fear. She feels traumatized as a result. She found it extremely upsetting that her neighbours learned that she was a police officer as a result of the investigation and media attention attendant upon the incidents. She has always been careful to avoid telling anyone other than her closest friends this as she is fearful of being harassed, harmed or threatened because she is a female police officer. HW is a registered sex offender and she is

advised whenever he is released into the community or changes residences. She continues to live in fear. She feels more threatened and unsafe as a result of requirement that she wear a name tag.

135. Officer Cowling had never met HW. The presence of a name tag would not have helped him to identify her. Further, as discussed below in the section dealing with expert psychiatric evidence with respect to stalking, there is no basis to think that the presence of name tags would have affected HW's behaviour.

136. Evidence was filed with respect to FN. On March 22, 2003, FN followed Officer N. Rueben after she left the police station in full uniform. He jumped her and attempted to rob her at gun point, attempting, unsuccessfully, to take Officer Rueben's service revolver. He was later arrested. He was found to be in possession of plate numbers and addresses of ten female police officers. On questioning, he stated that he had spent several weeks observing police officers coming and going from a police station. When he observed a female officer, he would record the plate number of her personal vehicle and later pay a $20 fee to the Ministry of Transport in order to obtain the home address associated with the vehicle. He stated that he planned to do a home invasion of a female police officer in hopes of getting her service revolver. He was charged with several robberies, including one in relation to Officer Rueben. He pled guilty to that offence and was sentenced to seven years.

137. It is possible that the presence of name tags would have made it easier for FN to obtain the home addresses of the female officers in question. What is noteworthy, however, is that FN was not deterred by their absence.

138. On September 13, 2005, Court Officer Andrew Peter Gronross was transporting a prisoner facing gang related charges. On route from the court, the prisoner stated that he was going to kill the officer when he got out as he had nothing to lose. Later, in the cell area, other threats were made against Officer Gronross and another officer by other detained members of the gang. At the time, the prisoners did not know the names of the officers. Additional charges related to the threats were laid against two gang members. The charges, which referred to the two officers by their full names, were later read out to the prisoner in open court by the presiding judge. That evening, Officer Gronross' residence received two blocked number hang up calls. The following day a female called and asked if she had reached the Gronross residence. Upon being advised that she had, the caller hung up. Officer Gronross reported this incident to his supervisor. Officer Gronross believes these calls to be related to the gang members. On a number of occasions thereafter, as the gang members were being transported to and from the court house, they would ask who "Andrew Peter Gronross" was. Officer Gronross has expressed the concern that the gang members were capable of following up on what he considers to be their threat.

139. The gang members clearly first learned of Officer Gronross' name not from a name tag but from the fact that it was read out in court. It is the case, however, that if Officer Gronross had been wearing a name tag, the gang members would have been able to associate the name with his face, in particular had Officer Gronross continued to be detailed to escort them to and from court. Assuming that the phone calls to Officer Gronross' residence were related to this incident, they are of course of concern. It is noteworthy, however, that there is no evidence the gang members did anything else to follow up on their threat to Officer Gronross, despite having his name.

**Officer X**

140. The Board heard testimony from an officer who is a member of a particular ethnic community (the "Y Community"). On the agreement of the parties, the officer is not to be identified in any way in this decision. The officer will be referred to as Officer X. Officer X described a series of incidents, all of which pre-date the introduction of name tags.

141. Officer X was born in another country. In addition to English, Officer X speaks the language of the Y Community. Officer X's name is distinctive to the Y Community: that is, it identifies Officer X as a member of that community. In addition, Officer X stated that for the majority of people from his/her country of origin, his/her appearance identifies him/her as a member of the Y Community[3].

142. There are several hundred thousand members of the Y Community in the Toronto area. There are a large number of gangs in the Y Community.

143. Officer X attended high school and post-secondary institutions in the Toronto area. While pursuing post-secondary studies, Officer X did volunteer work with members of the Y Community for a two year period. Officer X then worked as a youth worker at a community centre, doing outreach work with youth at risk in the Y Community, including those at risk of joining the gangs. Officer X left this position to join the TPS in April 2003. Officer X is one of fewer than 10 members of the Y Community who are members of the TPS.

144. Because of Officer X's ability to speak the language of the Y Community and knowledge of that community, the Intelligence Unit of the TPS used Officer X in a number of special projects related to serious offences and gangs in the Y Community. Officer X was involved in listening in to wiretaps and assisting in identifying individuals.

145. Officer X testified that policing is not seen as an honourable profession within the Y Community. In addition, some gang activity within the Y Community has developed to the point that it constitutes criminal business activity. Within the Y Community, as a police officer, Officer X would be seen as someone who would disturb that business on a day to day basis. Gangs in the Y Community respond to such threats to their criminal activities with threats and intimidation directed at the individual involved. Officer X testified that the gangs would start by burning the individual's car and progress to breaking the windows on the individual's house, firebombing the house or threatening family members. Officer X referred to one occasion in which Officer X was involved in the investigation of the fire bombing of a house.

146. Officer X stated that if a police officer not of the Y Community were to arrest a gang member of the Y Community, it would be seen as just an arrest, while if Officer X were to arrest the gang member "then it's personal". At the same time, Officer X was of the view that these threats would not be restricted to members of the Y Community. While Officer X had no first

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[3] In its written submissions, the TPA stated: "Although someone may not know [his/her] ethnicity by looking at [him/her], they would be able to tell from [his/her] name that [he/she] is [a member of the Y Community]". In fact, Officer X's evidence on this point is as described.

hand knowledge, Officer X referred to media reports that another police officer's truck had been burned.

147. Officer X goes to some lengths not to be identified as a police officer in his/her private life. Officer X does not wear a police uniform when travelling to or from work. Officer X does not tell anyone other than close acquaintances that he/she is a police officer. I note that these practices are consistent with the advice provided to all police officers in the "Member Personal Safety Issues" document jointly produced by the TPS and the TPA.

148. Officer X is particularly careful about trying to protect his/her identity from members of the Y Community. Officer X avoids if possible being the officer whose name appears on the various policing documents described earlier in this decision if the accused is a member of the Y Community. In particular, if Officer X is working with a partner, Officer X will tell the partner that he or she is going to be the arresting officer.

149. Officer X described a series of incidents which caused him/her to fear for his/her safety. All of these incidents pre-date the introduction of the name tags.

150. In November 2003 Officer X's Honda Accord was stolen from the street on which Officer X lived. Officer X reported this theft to the TPS under its "External Threats Against Service Members" policy. The vehicle was recovered about a month later. The identity of the person or persons who stole the vehicle was never determined. In cross-examination Officer X agreed that Honda Accord is on the top ten list of most stolen vehicles, that the area in which he/she was living at the time had a high incidence of car thefts and that it was possible that the car was stolen by someone who had no knowledge of his/her identity. Officer X also agreed that when the car was ultimately recovered, there was nothing about the car which linked it to gang activity.

151. Later in November 2003, a family member reported to Officer X that a vehicle containing a number of male members of Community Y was circling around and had slowed down in front of the house a couple of times. At the time, Officer X lived on a small street and there were no other families of the Y Community on the street. Officer X reported this incident under the "External Threats" policy as well.

152. Pursuant to the "External Threats" policy, a threat assessment was done by a TPS investigator in relation to the November 2003 incidents. The threat level was considered low as there was no intelligence information to indicate any threat or link to any Y Community gang.

153. In early December 2004 Officer X had been assigned to work the traffic detail with a partner. Officer X stopped a car for a traffic violation. There were two males of the Y Community in the car whom Officer X knew to be members of a Y Community gang from Officer X's previous work at the community centre. No charge was issued.

154. In mid December 2004, while off duty, Officer X went to a night club in the club district in downtown Toronto with other off-duty officers. While there, M, a member of the Y Community, came over to Officer X. Officer X knew M from high school and from the community centre. M is an individual known by Officer X to be a member of the same gang as the individuals who were in the car Officer X had stopped in early December. M told Officer X 'I

know you for sometime, I just want to tell you that the young [redacted] guys are going to shoot you for your involvement with the arrests of our guys, they know when to get you. So I am just cautioning you, they don't like you interfering with the gang.' Officer X responded 'I didn't do anything. I'll face it. I know how to protect myself.' Officer X reported this incident under the "External Threats" policy.

155. In early January 2005 Officer X was coming out of a court house and walking towards his/her personal vehicle. At the time Officer X was in plain clothes. Officer X observed a male, who from his appearance could have been a member of the Y Community, wearing a "hoodie" and holding a cell phone with which he appeared to be taking photographs of the front of Officer X's car. This was a different car from the Honda Accord which had previously been stolen. When Officer X got closer, the individual ran towards a parking lot of vehicles. A short time later, a vehicle sped off. Officer X reported this incident under the "External Threats" policy.

156. Officer X's report of the December 2004 night club incident triggered an investigation by the TPS pursuant to the "External Threats" policy. All of the incidents described above were reviewed. Officer X testified that his/her concerns were taken seriously. The investigator assessed the threat level as "Medium". A number of strategies were implemented or recommended to Officer X. Officer X was removed from the list of TPS members with special language skills. Officer X's residence was placed in the Special Address System. This means that the residence was flagged for the purposes of 911 calls by attaching to the address a brief synopsis of who was living at the address and the nature of the potential threat. A Medium threat level assessment tells a responder to a 911 call that there may be firearms involved. It was recommended that Officer X enrol in the address suppression program, but Officer X had done so from the time of joining the TPS. An "Officer Safety Bulletin" was issued in relation to Officer X and read on parade to officers of the police division for the area in which Officer X resided for the period of time surrounding the events. Officer X was advised to take the precautions described in the "Member Personal Safety Issues" document described earlier.

157. Officer X was also offered a transfer. However, Officer X turned down the transfer. Officer X testified:

> I did not want to run away. I became a police officer to do a job. This was the beginning of the job. I knew that I could work through it.

158. Officer X testified that he/she did not like it when the name tag policy was introduced. Officer X's name is rare even within the Y Community. With the introduction of the name tag policy, Officer X's strategy of hiding his/her name from members of the Y Community by having a partner issue any necessary paperwork when possible is not as effective.

159. During cross examination, Officer X acknowledged that he/she did not register any formal objection when the name tag policy was introduced. While Officer X expressed concerns about his/her vulnerability to colleagues, Officer X did not express any concerns to a supervisor. Officer X stated he/she did not want to be seen as a person who complains. Officer X testified that nothing significant had in fact happened since he/she had started to wear the name tag.

160. During cross examination, Officer X acknowledged that when working as a primary response officer, he/she would work with a partner on the evening and midnight shifts, but on the

day shift would "sometimes" work by him/her self. On those occasions, Officer X would have no choice but to be the arresting officer. Officer X had, in approximately four years of work in the TPS, been the arresting officer in numerous instances, though probably fewer than 300. Officer X also agreed that he/she has been asked for and provided his/her name numerous times to members of the public in his/her capacity as a police officer. Further, Officer X acknowledged that if he/she was the witness to a Provincial Offences Act or Criminal Code violation, then his/her name would be disclosed as a witness even if Officer X's partner was the arresting officer. Officer X is called as a witness at least 10 to 15 times a year, and on those occasions, Officer X's full name is spelled out in court. In one case, a homicide trial which attracted media attention, Officer X's name was mentioned in media reports.

161. In cross-examination, Deputy Derry acknowledged that if Officer X were working with another officer, then if a ticket was to be issued the other officer could do it. Deputy Derry, however, rejected the proposition that requiring Officer X to wear a name tag effectively took away his/her discretion in these circumstances.

162. While Officer X expressed a generalized subjective fear about what would happen if his/her name became known, all of the events described predate the use of name tags. Officer X was either known to be or identified as a member of the Y Community notwithstanding the lack of a name tag. There is no evidence the gang members did anything else to follow up on their threats to Officer X, despite having identified him/her. There have been no further threats since the introduction of mandatory name tags.

**Post-Name Tag TPS Incidents**

163. The first incident is not in fact "post-name tag", but as express reference was made to name tags, it is useful to group it here.

164. On July 6, 2006, Officers Corbie and Buggea attended at a residence where a suspect was reported to be armed with a knife, intoxicated and violent. The officers arrested the suspect, who had been drinking and admitted to assaulting a family member. The suspect was transported to a police station by the officers. While waiting to be processed, the following exchange took place between the suspect and the officers:

> "Can't wait until you guys get name tags"
> Officers responded by asking, why?
> "Because you know my name, so then I know yours. You know my kids, so then I'll know yours, you know my ex, so then I'll know your ex wife's name"
> Officers responded by asking, why do you need to know that?
> "Because its only fair, don't you worry I got my reasons"

165. The suspect would have learned the names of the arresting officers from the policing documents. There was no evidence before me of any attempt to carry out this threat. There was no evidence before me that either officer laid a charge as a result of this threat. The suspect had been drinking. This incident strikes me as falling within the "spur of the moment" category described earlier in this decision. As such, name tags are irrelevant.

166. On November 24, 2006, an individual was initially arrested for being intoxicated in a public place. Subsequent investigation resulted in additional charges being laid against the accused related to fraudulent use of credit cards. As the accused was being lodged in the cell area he looked at the name tags of the two officers and, referring to the names of the officers, stated: "McGowan, I got your name, you're dead. McGowan, Snykers, I got your belly." The accused was charged with uttering a death threat.

167. There was no evidence before me of any attempt to carry out this threat. Deputy Derry, while stating that he was always concerned when an officer was threatened, testified that this particular incident did not give rise to any concerns on his part about the use of name tags. He compared it to threats made to him by individuals he had arrested prior to the name tag policy. In cross-examination, he noted that the individual in question appears to have been drunk and held in custody for a minimum of 5 hours. He also noted that the investigating officer did not see fit to initiate a risk assessment. This strikes me as another "spur of the moment" threat. As such, name tags are irrelevant.

168. On November 24, 2006, an occurrence report was filed with respect to the fact that an unknown prisoner had scratched the words "killa c ross" on the metal frame of the door of a holding cell at the Toronto West Courts. C. Ross was a court officer at the location at the time.

169. There is no way of knowing whether this graffiti was in any way the product of name tags. It is similar to some of the graffiti which Mr. Wilson had investigated while he was a police officer, prior to the introduction of name tags. There was no evidence before me of any attempt to carry out this threat. It does not constitute evidence that name tags increase the frequency, or cogency, of such threats.

170. On November 24, 2006 Officer V. Bonazza, had an interaction with members of a gang outside a restaurant. The gang members became increasingly aggressive and belligerent. Members of the gang started to yell out his name. One gang member shouted out the officer's name and then proceeded to say "we are not done with you yet V. Bonazza". Other gang members echoed this phrase. The gang members then walked away. At least one gang member was well known to police, with an extensive prior history of charges. Officer Bonazza stated that he found "it very disturbing that these parties now know my family name and could possibly pose a significant danger to myself or any other family members if retribution is on their minds". In addition, Officer Bonazza expressed his personal belief that the gang members were capable of carrying out this threat.

171. There was no evidence before me of any attempt to carry out this threat. There was no evidence before me that Officer Bonazza laid a charge as a result of this threat. Deputy Derry testified that the incident did not cause him any concern with respect to name tags, noting that police officers engage with the public and sometimes undesirables. During such engagements police officers will sometimes be verbally threatened or challenged: that is part of walking a beat. I am not prepared to conclude that this is anything other than another "spur of the moment" threat.

172. On January 6, 2007, Officer Macnab was involved in the arrest of a violent parolee (a registered high risk offender with an extremely violent criminal past). After an intense and lengthy struggle, the accused was transported to a hospital for medical treatment. On route to the hospital the accused stated: "Hey Macnab …. You got a family? …. I know you do." Officer

Macnab believes that the accused obtained this information from his name tag. Officer Macnab reported the incident to his Unit Commander on Internal Correspondence which concludes as follows:

> The nature of the incident and the comments made by the accused made me very aware of the personal information being made available to offenders such as [K.M.]
>
> I wanted to express my concern to you and our Association representative with the above mentioned comments.

173. There was no evidence before me of any attempt to carry out this threat. There was no evidence before me that Officer Macnab laid a charge as a result of this threat. There is no evidence that a risk assessment was done as a result of Officer Macnab's report of this incident. It appears more probable than not that this was another "spur of the moment" threat.

174. On January 10, 2007 Court Officer, T. Murphy was transporting a prisoner from Old City Hall to a detention centre. One of the prisoners being transported said "Miss Murphy are you my driver today?" after he read her name on her name badge. The prisoner did not want to ride in the back of the prisoner wagon, claiming a bad back. Officer Murphy told him he had no option. As the prisoner was being escorted into the prisoner wagon, he said "I know where you live Miss Murphy. I see you walking your dog all the time." He then turned to the other prisoners in the wagon and said "She lives by [redacted]". This was an accurate description of the area where the apartment in which Officer Murphy used to live was located. Officer Murphy no longer lived in the apartment, but another court officer now lived in the apartment. When they arrived at the detention centre, the prisoner said to Officer Murphy that the next time he saw her walking her dog, he was going to punch her in the head. Officer Murphy learned that the prisoner in question had an extensive criminal record, including a conviction for manslaughter in 2001. The individual also had several prior convictions of obstructing a peace officer and a few convictions of assaulting a peace officer. Officer Murphy caused charges of threatening bodily harm to be laid against the prisoner.

175. Deputy Derry testified in cross examination that this incident caused him concern. It rose to the level of specificity which should have resulted in a threat assessment and some response.

176. I note that the threat arose not from the name tag but from prior knowledge as to where Officer Murphy lived and the fact that he recognized her. Notwithstanding the individual has Officer Murphy's name, there is no evidence that the individual has made any other threats or taken any other action against Officer Murphy. That is, there is no evidence that the individual has used Officer Murphy's name to obtain personal information for the purposes of doing her harm. While the threat was real, it too appears to have been in the "spur of the moment".

177. On May 5, 2007, Officer J. Brown was transporting an arrested male, charged with "over 80 mg" (i.e. driving while impaired) back to a police station. The male made numerous comments to her, including "you know what J. Brown, I'll see you on the streets and I won't forget your name J. Brown, and your face", "J. Brown, I bet you have kids … that's okay … when I'm on the streets I'll be free then … maybe I'll send you flowers J. Brown".

178. Officer Brown reported this incident to Officer Andria Cowan, a TPA steward. There is no evidence before me that Officer Brown reported this incident to her supervisor. There is no evidence before me that she laid charges as a result. It appears more probable than not that this was another "spur of the moment" threat.

179. The incident involving Officer Thompson following the introduction of the name tag policy occurred on June 14, 2007. She attended at an apartment in uniform, wearing her name tag, with her police partner, a male. Upon entering the apartment, an individual punched her in the face and tried to take her service revolver. Once Officer Thompson and her partner had subdued the individual, he looked at her and said "I know who you are and I'm going to kill you". There is no suggestion that the individual used Officer Thompson's name or even looked at her name tag. Nonetheless, Officer Thompson believes that the individual claimed to know her because he saw her name tag. Officer Thompson understands that the individual in question suffers from schizophrenia. He was charged with assaulting and disarming a police officer. While Officer Thompson reported the threat, the offender was not charged with making a threat. Officer Thompson felt very shaken by the incident. While she acknowledges that she had been threatened before as a police officer, this was the first time that she had been violently threatened as a police officer.

180. Notwithstanding the fact that Officer Thompson was wearing a name tag, her name was not in fact used in the threat. No charges were laid in relation to the threat. Officer Thompson's name would have been disclosed to the individual in any event as part of the Crown disclosure brief. There is no evidence that the threat has been carried out. I conclude that this was most likely a "spur of the moment" threat and that in any event the name tag had no effect on the likelihood that the threat would be carried out.

181. The TPA relies upon a redacted summary of a threat assessment with respect to an incident which occurred on September 18, 2007. The front desk of a police station received a telephone call from a payphone. The caller stated "Fucking [redacted] and [redacted] are dead" and then hung up. The TPS conducted a threat assessment. The two named individuals were detective constables of the TPS. They believed the call to be related to a criminal prosecution of five gang members. The gang members had been arrested between November and December, 2006. The prosecution took place in 2007.

182. I note that as the officers involved were detective constables, they would not have been in uniform and hence would not have been wearing name tags. In any event, the names of the officers would have been disclosed to the gang members during the course of their prosecution.

183. The TPA also relies upon a redacted summary of a threat assessment with respect to an incident which occurred in or around the beginning of March, 2008. The summary states in its entirety:

> Approximately six weeks ago, information was received at [redacted] Division by a third party that an individual wasn't happy with [redacted] of [redacted] Division because of his efficiency at being a very good enforcement officer. The officer works in the [redacted] office and has been effective at making street gangsters accountable for criminal conduct. The gangsters are feeling the heat. The individual apparently told another person what he would like to do to the officer. The officer re-located for the

> weekend with his wife because of safety concerns when he first learned of the threat, but has since returned home to [redacted] Division. Enforcement initiatives have taken place where the gangsters live. Some arrests have been made for criminal acts. The investigation is on-going and well in hand.

184. This summary simply provides insufficient information to permit any conclusions to be drawn about the effect, if any, of name tags.

185. On April 14, 2008, Officer Ramsbottom arrested an individual known to carry guns, and known to be a drug dealer and a pimp. For reasons not in evidence before me, Officer Ramsbottom was then in an ambulance transporting the individual to a hospital. The individual saw Officer Ramsbottom's name tag and said "Ramsbottom, I'll remember that name." No threat was made, but the individual also kept saying "My money talk. My people look after me and do what I say."

186. Officer Ramsbottom reported this incident the next day to the TPA. There is no evidence to suggest Officer Ramsbottom reported this incident to his supervisor, as he would be required to do under the policies of the TPSB if he considered the comment to be a threat. There is no evidence that Officer Ramsbottom caused charges to be laid in relation to the comment. There is no evidence that anything arose out of the comment. I conclude, therefore, that the comment was at best a "spur of the moment" threat, and was considered as such by Officer Ramsbottom.

187. In summary, there are eleven post-name tag incidents. In four there is either insufficient information to conclude that a name tag had anything to do with the incident or it appears most likely that the officer was in plain clothes and thus was not wearing a name tag. The other seven incidents appear to be "spur of the moment" threats. The officer's name is simply another piece of information used by the individual in question. While discomfiting, and in some cases illegal, these threats are not dissimilar to the day to day experience of police officers. There is no evidence that the name was used to obtain personal information in relation to an officer in order to engage in further threats or actions against the officer. This evidence does not establish that name tags increase the risk of harm to police officers beyond that which is inherent to the work.

### Incidents from Outside the TPS

188. The parties agreed to stipulate to the accuracy of some summaries of the experience of other police services contained in Chief Blair's Report or in submissions which the TPA had made to the TPSB on the issue of name tags.

189. Chief Blair's Report indicates that the Ontario Provincial Police introduced name tags for its officers in the late 1980s. In 2003, following an incident, the use of name tags was made voluntary. The evidence before me relied upon by the TPA is as follows:

> This change was brought about when a member of the Guelph detachment had been involved in a pursuit with a member of a local motorcycle gang. The member's name appeared on the accident report and the gang member subsequently contacted the officer at home.

> The issue of name badges was raised by the Ontario Provincial Police Association and brought to the attention of Commissioner Gwen Boniface as a health and safety issue. Although a direct link could not be made to the officer's name badge as the originating source of this harassment, the O.P.P. updated its policy on July 9th, 2003.

190. As stated "a direct link could not be made to the officer's name badge as the originating source of this harassment". I note as well that the member's name was otherwise available to the gang member from the accident report. This incident does not constitute evidence that name tags increase the frequency of threats to police officers.

191. The TPA relies upon the following summary in Chief Blair's Report with respect to the experience of the Winnipeg Police Service:

> [A]lthough the Winnipeg Police Service does not require its members to wear name badges, in its response to the survey questionnaire, it advises of instances where members have been harassed. Some members' homes and vehicles have been the target of arsons; as well these members have experienced disruptions at family events by members of the Hell's Angels motorcycle gang. This service also reported off-duty members being severely assaulted by gang members, as well as surveillance conducted on uniform and plainclothes officers by organized crime gang members.

192. The TPA relies upon this statement principally as evidence of the degree of harm which police officers can face from gang members. This is not in dispute. The conclusion I draw from this evidence, however, is that gang members in Winnipeg who wished to do police officers harm were not deterred by the absence of name tags.

193. The Calgary Police Service has required its members to wear name tags for twenty years. The TPA's submissions to the TPSB contained a summary of "examples" of the experience of the Calgary Police Service. The TPA indicated that it learned of these examples from a Toronto Star article, but then verified the information by calling the then president of the Calgary Police Association, Al Koenig. The TPSB agreed to stipulate that this would be the evidence which Mr. Koenig would give:

> Example 1
>
> A Calgary police officer routinely visited a local Hells Angels clubhouse while wearing his name tag, as required by the Calgary Police Service. The officer began receiving messages from the bikers for his wife and young children, whom the bikers referred to by name. Subsequently, trespassers entered the officer's back yard late at night. The police officer was sufficiently shaken that he was transferred to another division.
>
> Example 2
>
> A Calgary police officer investigating Asian gangs had to be pulled from the case after his Vietnamese wife began receiving threatening calls at work from gang members speaking in her native tongue.

> Example 3
>
> A police officer was removed from a successful run of crack house arrests after drug dealers began calling death threats to his house.

194. Thus, the evidence before the Board with respect to the experience of the Calgary Police Services after twenty years of its officers being required to wear name tags is limited to the hearsay evidence of Mr. Koenig with respect to the three examples set out above. Only in the first example is there even a reference to name tags. This evidence is of limited cogency.

195. The TPA also relies upon an incident involving a threat against a member of the Peel Regional Police. Members of the Peel Regional Police do not wear name tags. The parties agreed to stipulate to the accuracy of the following description of the incident, contained in an "Officer Safety" bulletin issued by the Peel Regional Police:

> [Redacted] contacted the PRP Fraud Bureau and disguised his voice pretending to be an individual with information on the whereabouts of [redacted] thus requiring the investigating officers home phone number. (Ref# 04-184881). Another officer within the Fraud Bureau recognized the caller's voice as being the above party and challenged his identity. The above party became irate and demanded the whereabouts of the investigating officer.
>
> The above party has also threatened officers in [redacted] division CIB with regards to a criminal harassment/utter threats occurrence (#04-214750) refers). On Thursday October 28, 2004 at 1620 hrs the accused [redacted] contacted CST. [redacted], of [redacted] DIV CIB. During this time the accused was in a continuous state of anger. He yelled at the officer "I'm going kill you. I'm going to rip your face off. Meet me at Mavis and Eglinton you fucking queer". It should be noted that the entire conversation the accused was in an out of control state and was not rational [sic].

196. Once again, the TPA relies upon this statement principally as evidence of the degree of harm which police officers can face from angry members of the public. This is not in dispute. The conclusion I draw from this evidence, however, is that to the extent that this individual intended an officer harm, he was not deterred by the absence of name tags.

197. This evidence does not establish that name tags increase the risk of harm to police officers beyond that which is inherent to the work. The absence of evidence that it does is telling given that the use of name tags by police services across North America is both widespread and longstanding. I note in this respect that Deputy Derry testified that as the Deputy in charge of name tags he had made efforts to learn of any issues dealing with name tags anywhere in the world. To this end, he has utilized a network maintained by the FBI National Academy to contact over 1200 policing agencies around the world. He had received no information in response. He noted that the use of name tags is widespread, including by police services in New York City and Los Angeles.

## Organized Crime and the Creation of Data Bases

198. Mr. Wilson has significant expertise in the uses and abuses of the internet, data recovery and electronic search and seizure. He has been qualified to give expert evidence on these subjects and since his retirement has acted as a private consultant on these issues.

199. The TPA sought to qualify Mr. Wilson to provide expert opinion evidence with respect to whether the wearing of name tags increases the risk of harm to police officer or other members of the TPS. I was not satisfied that an opinion on that issue fell within Mr. Wilson's areas of expertise, and I ruled accordingly. Mr. Wilson was permitted, however, to provide evidence, based on his personal experience, on whether organized crime targets police officers involved in criminal investigations and their families and whether, in today's electronic environment, with a name it is easier to gather personal information.

200. Mr. Wilson testified that organized crime, including motorcycle gangs and other gangs, has created massive databases where such personal information is stored. Samples from a website maintained by the Hells Angels were put into evidence. The website first made an appearance in 1990. It includes a section with photographs of police officers. Mr. Wilson provided a random sample of several dozen photographs of police officers: some are in uniform; some are undercover. The undercover officers are all at bike shows and other locations where bikers hang out. They are there for the purposes of gathering intelligence: there is no suggestion that they were undercover posing as members of the subject gangs. The website is updated on an annual basis. The photographs on the website may date back to 1990. All of the officers are engaged in policing activities in relation to motorcycle gangs. Some are identified (not always correctly). Viewers are asked to supply the names of the unidentified officers.

201. Mr. Wilson testified, and there really is no dispute, that in the age of the internet with a name a great deal of personal identifying information about an individual may be obtained relatively easily, including the individual's address if that information is contained in any record accessible through the internet. Mr. Wilson also testified that historically organized crime had used vehicle licence numbers as a way of obtaining this personal information. (In this respect, I note that Mr. Molyneaux conceded that a common name might yield hundreds of results, while a vehicle licence number would give a unique result.)

202. In cross-examination, Mr. Wilson agreed that the names of officers have always been available to members of the public. He offered the opinion, however, that it was one thing to be able to jot down the name of an officer and another, for example, to have to call a police station with a badge number in order to obtain the name. He suggested that in his experience if someone has to do a lot of work, then they won't do it. He then agreed, however, that a stalker or member of organized crime would not be deterred.

203. In cross-examination, Deputy Derry indicated that he was aware that organized crime and motorcycle gangs try to collect data about police officers. He agreed that if they had personal information about a police officer it would be very useful to them if that police officer were assigned to work undercover. He also agreed that today's recruit could be tomorrow's undercover officer. He disagreed, however, that a name tag makes the collecting of personal information easier. He stated that the reality is that the information is available on the internet. He noted that the difference between a name tag and a badge number is one step. That, to him, was not easier.

204. Mr. Wilson offered the opinion that the information in these databases is shared amongst the criminal element and had been used to harass, stalk and threaten identified officers and their families. It was also his opinion that the information is used to track officers involved in current operations and is stored to be used in the future should the officer become undercover working against drugs, gangs or organized crime. He was not, however, qualified to give this opinion evidence.

205. Mr. Wilson was questioned with respect to his actual experience of officers being threatened, stalked and harassed. Some of that evidence was reviewed above under the heading of "The Experience of Being a Police Officer". Mr. Wilson also testified that he had investigated an instance of a constable receiving a threatening phone call at home as a result of testimony the constable had given in court earlier in the day. The caller threatened to kill the officer and his family. I note that the officer's name would have been spelled out in court when he was called to give evidence and that the threat appears to have been specifically related to the giving of the evidence. Mr. Wilson also testified about female officers receiving threats accompanied by photographs and descriptions of acts which would be committed upon the officer. Mr. Wilson provided no evidence as to how these officers were identified. I note, however, that since Mr. Wilson retired prior to the introduction of name tags, they could not have been a factor. Mr. Wilson testified as to one instance in which a female officer was followed home. I note that as the officer was followed, it would appear that even if the offender had somehow obtained the officer's name, the name was not used to obtain the officer's address. There was no evidence that any of these incidents were related to gangs or organized crime.

206. Deputy Derry testified that the only instance of an assault on a police officer by gang members of which he was aware was a case involving an OPP officer who had been working undercover as a member of a biker gang. The officer, apparently, was carrying his police badge on his person while working undercover. At some point, the officer's badge fell out of his clothing and was seen by the other gang members. They beat him and left him for dead.

207. I note that there is no suggestion in any of the examples provided by Mr. Wilson or in the case of the OPP officer described by Deputy Derry, that the threat, stalking or assault arose from the use of data stored or shared by members of gangs or organized crime.

208. I conclude that organized crime and motorcycle gangs do maintain data banks containing personal information in relation to police officers. This information may well serve to make policing activities less effective: it is unlikely that a known police officer will be able to work undercover with a gang or organized crime. There is no evidence, however, that this information has been used to harm police officers. Further, based on the evidence of both Mr. Wilson and Deputy Derry, I conclude that to the extent that organized crime and motorcycle gangs wish to obtain that information about an officer, they were not deterred by the absence of a name tag. Accordingly, I conclude that the evidence does not establish that the presence of a name tag increases the risk of harm to police officers from organized crime or gangs.

### Expert Evidence on Mental Health Issues and the Risk Posed by Stalkers

209. Dr. Graham Glancy is a psychiatrist specializing in forensic psychiatry. He was tendered as an expert witness by the TPA. Following a voir dire, Dr. Glancy was qualified to give

expert opinion evidence with respect to "the increased risk of harm that stalkers might pose to persons whom they are able to identify".

210. Dr. Phillip Klassen is also a psychiatrist specializing in forensic psychiatry. He was tendered as an expert witness by the TPSB. On agreement of the parties, Dr. Klassen was qualified to give expert opinion evidence with respect to "boundary violations and the risk of unwanted pursuit, stalking and interpersonal violence".

211. Dr. Glancy defined stalking as repeated acts, experienced as unpleasantly intrusive, which create apprehension and can be understood to be grounds for becoming fearful. While not taking issue with this definition, Dr. Klassen noted that not all stalking so defined gives rise to post-traumatic syndromes on the part of the person stalked. A distinction must be made between the experience of an irritant or an annoyance on the one hand and the elevation of that experience to the level of apprehension of fear. Only the apprehension of fear gives rise to post-traumatic symptoms.

212. Prior to dealing with the evidence with respect to stalking, I wish to address the other evidence led through these two witnesses. A great deal of evidence was led with respect to other mental health issues. For reasons which I will shortly state, it is sufficient to summarize this evidence.

213. Evidence was led with respect to the relative incidence of mental health problems in the population encountered by police in the course of their duties. That evidence established that there is a high incidence of mental health problems in that population compared to the general population. As Dr. Klassen noted, it is not the case that all individuals with mental health problems pose a risk of harm. Nonetheless, it is the case that police officers will encounter a disproportionate number of individuals with severe and persistent mental illness, such as schizophrenia, bipolar disorders and schizo-affective disorders. As a group, these individuals have a higher rate of violence than the general population.

214. Drs. Glancy and Klassen both testified that psychological trauma is cumulative. To the extent that a person has experienced prior traumatic events, they may be more sensitive to events of subsequent trauma. As a group, police officers face a higher burden of traumatic stress than the general population so all else being equal they are likely to be more vulnerable to additional traumatic stress, such as being stalked. Both agreed that police officers are better equipped than members of the general public to stop stalking behaviour. Both also agreed, however, that if a police officer was stalked then since police officers as a group have faced more prior traumatic events, they are potentially more vulnerable to psychological trauma as a result. As Dr. Glancy put it, "when somebody gets behind that shield, it can actually cause enormous frustration, anxiety and anger that can develop into serious psychological symptoms".

215. A great deal of evidence was also led with respect to the incidence of Post Traumatic Stress Disorder (a diagnosis which requires fulfillment of a number of specific criteria listed in the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision (DSM IV TR), hereafter "PTSD") or at least post traumatic stress symptoms amongst police officers. Dr. Glancy asserted that 30% of active police officers have post traumatic symptoms at any given time. Dr. Glancy suggested that this conclusion was supported by the literature. He was unable to give a specific reference during his testimony, but undertook to provide the literature following

the conclusion of his evidence. Dr. Klassen reviewed this literature. Dr. Klassen noted that a distinction must be made between "point in time" incidence of PTSD or post traumatic symptoms and "life time" incidence of PTSD or post traumatic symptoms. His review of the literature did not support the conclusion that 30% of active police officers suffer from PTSD at any given point in time. Dr. Klassen was prepared to agree that the life time incidence of PTSD among active police officers was higher than the average for the general population of 10%, but in the absence of any empirical studies would not specify a number.

216. This part of the evidence establishes that the population that police officers work with has a disproportionately high number of individuals with mental health problems. It also establishes that police officers, as a group, face a higher burden of traumatic stress than the general population as a result. This evidence does not, however, establish that the wearing of name tags in any way contributes to that burden of traumatic stress.

217. Similarly, this part of the evidence can be understood as establishing that police officers face a level of risk as a result of working with individuals with mental health issues. The TPA identifies the incidents involving Officer Gronross, DM, and Officer Rueben, as well as the incidents involving Ms. DiDaneli as falling into this category. I will address the Ms. DiDaneli/ND incident in greater detail below. But what this part of the evidence does not establish is that the wearing of name tags increases the level of risk faced by police officers in working with individuals with mental health issues. There was no evidence of such a linkage.

218. I turn now to the evidence with respect to stalking. Drs. Glancy and Klassen agreed on some facts and disagreed with respect to others.

219. Drs. Glancy and Klassen agreed that the victims of stalking can experience significant psychological harm as a result of the realization that they are being stalked. Further, Drs. Glancy and Klassen agreed that approximately two thirds of stalkers threaten their victims with violence and one quarter to half of stalkers are actually violent towards their victims.

220. Much of the research with respect to the psychological harm caused by stalking is based on studies of the general population. There is no research specific to police officers. Drs. Glancy and Klassen disagreed with respect to the degree that a name tag increases the risk of harm due to stalking.

221. Dr. Glancy's opinion was that the wearing of name tags increased the risk that some mentally disturbed persons will use that information to stalk and harm officers and their families in two respects. First, the name can result in an erosion of the professional boundary between the officer and the potential stalker. Second, stalkers can be remarkably persistent and a name tag makes it quicker and easier for a stalker to obtain the officer's personal information.

222. I note that whether or not a name tag makes it quicker and easier for a stalker to obtain an officer's personal information is not an issue upon which Dr. Glancy was qualified to give expert opinion evidence. At the same time, I am prepared to accept that a name tag makes it quicker and easier to determine the name of an officer. Further, there was no serious dispute that with a name it is relatively easy to obtain personal information about most individuals by performing relatively simple searches on the internet. But that is not the issue. The issue is whether the name tag materially increases the probability that an individual will do an officer

harm or materially increases the seriousness of the harm which an officer experiences if that probability is realized.

223. Dr. Glancy repeatedly stated that it was his “contention” that name tags made it quicker and easier for a potential stalker to identify an officer and ultimately stalk an officer. However, with the exception of the issue of the erosion of professional boundaries which I will address below, Dr. Glancy did not describe any psychological mechanism by which a name tag would materially increase the probability that a potential stalker will do an officer harm or materially increase the seriousness of the harm which an officer would experiences if that probability were realized.

224. I turn now to the issue of erosion of professional boundaries. Dr. Glancy defined the boundary as the distance between a professional helper, such as a police officer, and the recipient of the services. His affidavit, which served as his evidence in chief, continued:

> It is the responsibility of the professional to maintain this professional boundary and to act in a professional manner. Members of the public who interact with or receive services from professionals may not have the knowledge or ability to maintain professional boundaries. Sometimes minor boundary violations may begin as simple acts of kindness or courtesy. They can be rationalized under the guise of flexibility and human concern. Sometimes, however, such acts can give the wrong message to individuals who may believe that the professional is acting as a friend or suitor. This can lead to the individual receiving entirely the wrong message and interpreting helping gestures in an inappropriate or even sexual manner.
>
> This can result in such persons becoming obsessed with or fixated upon a professional who is helping them. This may result in the stalking of the professional.

225. Dr. Klassen noted that professional boundaries are profession and task specific. For example, appropriate professional boundaries of a nurse differ from those of a police officer and the professional boundaries for a nurse in an emergency unit may differ from those of a nurse on a long term psychiatric care unit. It is part of the task of professionals to manage the professional boundaries and to be sensitive to potential boundary issues. There are steps that a professional can take to restore effective boundaries. For example, a police officer introduces himself by saying “Hi, I’m John Smith” and is met with the response “Hi John”. That police officer can attempt to restore effective boundaries by saying: “Let’s keep this professional. Call me Officer Smith.” Dr. Klassen agreed, however, that in theory minor boundary transgressions could lead to major negative results, such as stalking.

226. The issue, of course, is whether an officer wearing a name tag materially increases the probability of a boundary violation which results in stalking. The answer depends in part on the nature of the stalker. Not all stalkers share the same characteristics. The TPA relies upon one widely accepted and used categorization of stalkers developed by an Australian Forensic Psychiatrist, Professor Paul Mullen,:

1. The Rejected Stalker
2. Intimacy Seekers

3. The Resentful Stalker
4. The Incompetent Stalker
5. The Predatory Stalker

These categories are not watertight: individuals may move between categories.

227. Dr. Klassen noted that other systems have been proposed and are used for the classification of stalkers. Dr. Klassen also noted that Mullen's estimates as to the percentages of different types of stalkers were drawn from a "sample of convenience". That is, Mullen used a known pool of stalkers and categorized them. While it is perfectly scientifically acceptable to use such samples of convenience, the results may or may not reflect the true proportions of different types of stalkers in the population as a whole. Dr. Klassen testified that a review of the literature as a whole suggests that the bulk of stalkers are former intimate partners and that this group has the highest rate of violence. The risk of violence is generally progressively less from stalkers whose relationships with the victim are more distant. He agreed in cross examination that the risk of violence from Intimacy Seekers was, as suggested by Mullen, the lowest. Subject to these caveats, I turn to Mullen's classification of stalkers.

228. The Rejected Stalker is the most common, constituting according to Mullen 35% of all stalkers. In Dr. Glancy's experience, the number may be higher. The Rejected Stalker generally begins stalking after the break up of a relationship in which he[4] feels abandoned, typically when a woman leaves after the dissolution of a marriage. These stalkers represent the highest risk of violence.

229. In cross examination, Dr. Glancy agreed that since Rejected Stalkers know their victims intimately, the "boundaries" will have dropped away years ago. Put differently, a name tag does not increase the probability of this form of stalking.

230. Intimacy Seekers are the next most common type of stalkers. Mullen puts 34% of stalkers in this category. Intimacy Seekers are seeking a relationship with the victim with whom they identify, as a result of delusions, as their intended or true love. When rejected, Intimacy Seekers are capable of extreme violence; however as compared to other groups they have the lowest frequency of assaults (23%). At 50%, they are at the middle of the groups in terms of frequency of assaults. Both male and female officers are vulnerable to Intimacy Seekers. Dr. Glancy was of the opinion, however, that female officers are particularly at risk from individuals who develop a pathological infatuation. In his affidavit Dr. Glancy stated:

> The wearing of a name tag may be the first boundary transition as it changes the police officer from simply a police officer to a person. To the vulnerable person any hint of familiarity could be seen as "leading them on", and this will fuel their infatuation.
>
> [Emphasis supplied.]

231. In cross-examination, Dr. Glancy agreed that as there is an element of irrationality in the underlying delusional beliefs of Intimacy Seekers, a number of things, apart from name tags, could trigger the belief. This included the various other ways in which an officer might provide

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[4] Virtually all Rejected Stalkers are male.

their name to the Intimacy Seeker, but also included the demeanour of the officer. He maintained, however, that name tags increased the probability of such delusional beliefs. The basis for this assertion was never made clear. There are no studies which support it. Dr. Glancy conceded that a name tag bearing only an individual's first name would be seen as the most familiar and therefore the most likely to lead on an Intimacy Seeker, a name tag bearing first name and last name less likely to do so and a name tag bearing only first initial and last name, such as used by the TPS, even less likely.

232. In his affidavit, which served as his evidence in chief, Dr. Glancy also stated that:

> [I]ntimacy seekers are amazingly persistent. They tend to stalk for long periods of time, sometimes up to 10 to 20 years. It can be difficult or even impossible to stop such activity. Even legal injunctions such as restraining orders do not have any effect, as the person sees this as just another insurmountable barrier that can be overcome.

Dr. Glancy notes that an Intimacy Seeker will therefore use a surname from a name tag to locate and stalk an individual. I draw a different conclusion from this evidence. Once an individual has become the object of an Intimacy Seeker's delusions, the presence or absence of a name tag is immaterial. The Intimacy Seeker will doggedly seek out the individual in either event.

233. The Resentful Stalker accounts for, according to Mullen, 11% of all stalkers. Dr. Glancy described this group as generally acting out of a sense of grievance because of some type of humiliation and embarrassment that they perceive. They are generally the type of people who feel persecuted and some may even have paranoid delusional orders or paranoid schizophrenia. Their purpose is to frighten, cause distress or even physical harm to their victims.

234. In cross examination, Dr. Glancy agreed that Resentful Stalkers are not motivated by boundary transgressions. Rather, in the context of policing, it is the perception of police activity which motivates the Resentful Stalker. The name badge is immaterial for this purpose. Its significance to Dr. Glancy was, once again, that it made it easier for the Resentful Stalker to obtain information, and hence power, over their victim in the future.

235. The Incompetent Stalker accounts for 15% of all stalkers according to Mullen. Dr. Glancy described this group as generally including:

> … intellectually and socially limited individuals whose knowledge of courting rituals is elementary. Sometimes they have a sense of entitlement to a partner but no capacity to really establish a relationship. They are unable to read the normal social signals of whether their attraction towards a person is reciprocated. They may have conditions such as Aspergers syndrome in which they are unable to read social cues.

Incompetent Stalkers do not pose a serious danger to their victims, but they are a nuisance.

236. In cross examination, Dr. Glancy agreed that name tags do not act as a psychological trigger for Incompetent Stalkers. Rather, his contention was, again, that a name tag simply makes it easier for this type of stalker to identify their victim and hence locate them in the future.

237. Predatory Stalkers are, fortunately, the rarest category: 5% according to Mullen. These are the sexual sadists whose goal is to effect a sexual assault on their victim. Predatory Stalkers are most likely to be male; their victims female. Dr. Glancy's evidence was that predatory stalkers can be remarkably accomplished at stalking and that they often become experts in the use of computers and surveillance equipment.

238. In cross examination, Dr. Glancy agreed that not much is known about how Predatory Stalkers select their victims. More particularly, he agreed that he was not suggesting that a name tag was the basis on which a Predatory Stalker selected his victim. Dr. Glancy suggested that Predatory Stalkers may be less persistent than Intimacy Seekers, Rejected Stalkers or Resentful Stalkers.

239. Dr. Klassen made a distinction between sexual sadists and Predatory Stalkers. He testified that while the number of sexual sadists in the community is small, of the ones that he has assessed, most did not engage in extensive stalking: rather the assault tended to happen fairly quickly after meeting the woman.

240. In summary, it was only with respect to Intimacy Seekers that Dr. Glancy's evidence suggested a connection between name tags and the motivation of the stalker or the selection of their victims. In this respect, Dr. Glancy acknowledged that the underlying delusional beliefs of Intimacy Seekers were irrational and could be triggered by a variety of things, including simply the demeanour of the individual with whom the Intimacy Seeker was interacting. Dr. Glancy repeatedly asserted, however, that name tags increased the probability of such delusional beliefs. The basis for this assertion was not made clear.

241. Dr. Klassen rejected Dr. Glancy's assertion. There are no empirical studies which show a connection between name tags and the delusional beliefs of Intimacy Seekers. There are no empirical studies with respect to stalking and police officers whatsoever. In the result, I am not satisfied that the TPA has established that name tags increase the probability of delusional beliefs on the part of Intimacy Seekers.

242. It is useful to apply Mullen's categories to the examples relied upon by the TPA. I commence by noting that in most of them, there was no suggestion of stalking at all. Rather, a threat was made in the spur of the moment.

243. Drs. Glancy and Klassen were specifically asked to comment on the case of ND stalking Ms. DiDaneli. Based on the material Dr. Glancy described ND as a Predatory Stalker. Dr. Klassen described ND as a sexual sadist who might be a Predatory Stalker. Dr. Glancy described DM, the individual whose child was apprehended by the Children's Aid Society with the assistance of police, as being an example of a Resentful Stalker. The Peel Regional Police example was not put to either Drs. Glancy or Klassen. It appears to me, however, to be at best another example of a Resentful Stalker. The incident involving Officer Cowling was not put to either Dr. Klassen or Dr. Glancy. On its face, however, it is described as involving a known sexual predator. In any event, none of these cases involved an Intimacy Seeker. That is, based on the evidence of both Drs. Klassen and Glancy, there is no basis on which to conclude that a name tag would have had any effect on any of these incidents.

244. While Officer Thompson believed that in two separate instances she was being followed, or stalked, by an individual seeking intimacy, her case was not put to either Dr. Glancy or Dr. Klassen. It is far from clear to me that the behaviour described by Officer Thompson could be elevated to the level of stalking by an Intimacy Seeker. However, to the extent that it can be then it was not triggered by a name tag: the events in question took place in the 1990s, before the introduction of mandatory name tags.

245. In conclusion, the expert evidence of Drs. Glancy and Klassen did not establish that there was an increased risk of harm to members of the TPS from the wearing of name tags.

### Other Material Relied Upon By the TPA in Support of its Assertion that Name Tags Constitute a Risk of Harm to Police Officers

246. The TPA introduced into evidence several orders, settlements and decisions which it argues have recognized the risks posed by name tags.

247. The TPA filed two orders issued by a Ministry of Labour Inspector against the City of Toronto in 2002 and 2003 with respect to its name tag policy as it applied to frontline workers in its Social Services Division. The policy required workers to wear a name tag which had their surname. Pursuant to section 25(2)(h) of the Act, the Inspector ordered the City to ensure that "any identifier on the name tag worn by social services caseworkers would not afford a client an opportunity to locate such caseworker's place of residence". An appeal by the City of Toronto from those orders was subsequently withdrawn pursuant to minutes of settlement.

248. The TPA also filed a copy of a 1995 Inspector's order with respect to the Toronto East Detention Centre. That order states in its entirety:

> Pursuant to section 25(2)(h) of the Occupational Health and Safety Act the employer shall ensure that where a CO [correctional officer] has been identified by an inmate or where there is a possibility of a CO being identified by an inmate under the current "Directive" dated Aug 10, 1995 "Provision of Name Tags to Ministry Institutional Employee" an alternative method of identifying shall be established. This shall eliminate any possible identified [sic] by inmates but ensures management will be able to be specific in connecting the identification to one CO and such shall be made available to those COs requesting the same.

There is no narrative report attached to the order and no other description of the circumstances giving rise to the order. An application for interim suspension of the order was dismissed by a three paragraph decision of the Board (differently constituted) dated July 25, 1997 (Board File No. 1130-97-HS). The decision simply indicates that having considered the "submissions" of the parties, the employer had not satisfied the criteria for the suspension of an order pending the disposition of the appeal.

249. The TPA filed a consent order of the Grievance Settlement Board dated November 7, 2000 giving effect to a "without prejudice and precedent" settlement of a grievance relating to employees of the Family Responsibility Office of the Ministry of the Attorney General. The employees had been required to identify themselves using their first and last names. The settlement permitted them to identify themselves only by their first name and identification

number. It is interesting to note, however, that the settlement specifically provided that in the case of "documents prepared for use in court" employees continued to be required to use their full names.

250. Finally, the TPA provided a Canadian Labour Arbitration Summary City of Winnipeg and the Winnipeg Police Association (May 20, 1986, MacLean) 1 C.L.A.S. 93. That summary reads in its entirety as follows:

> PRIVACY – Employer ordering police officers to wear name tags – Order improper.
>
> Uniformed police officers assigned to specific duties ordered to wear name tags. Union opposed to unilateral order. Union felt would leave officers open to harassment. Held: Grievance allowed. Unreasonable order by employer. Wearing name tags could leave officer open to public harassment, 4:1500.

251. The TPSB provided a copy of the actual arbitration award. It is very brief. The reasoning in the award itself is not much more elaborate than that set out in the summary. The evidentiary basis for the arbitrator's conclusion consists of the following sentence: "Evidence of harassment, such harassment having taken place prior to the introduction of name tags, was introduced." There is no further description of that evidence. The award contains no consideration of whether the past harassment in any way related to knowing an officer's name, let alone whether there was any evidence that knowing an officer's name would increase the level of harassment in the future.

252. I agree with the TPSB that these orders, settlements and decisions are of little assistance in determining the issue before me. To the extent that they are relied upon as evidence, they contain no description of the underlying facts. There is, therefore, no basis on which it could be concluded that the circumstances were similar to the ones before me: in the cases made in a non-policing context (i.e. the City of Toronto Social Services Division, the Toronto East Detention Centre and the Family Responsibility Office of the Ministry of the Attorney General) they almost certainly were not. To the extent that they are relied upon as the foundation for a legal argument they are essentially devoid of reasoning. The one exception is the 2003 Inspector's order with respect to the Social Services Division of the City of Toronto. It does not engage in the kind of analysis set out in this decision. I do not find it of assistance.

253. In final argument, the TPA filed several decisions under the *Municipal Freedom of Information and Protection of Privacy Act* involving the Metropolitan Toronto Police Services Board, the predecessor to the TPSB: *Order M-465*, [1995] O.I.P.C. No. 69; *Order M-913*, [1997] O.I.P.C. No. 77; and *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.) (application for judicial review of *Order M-913*). The TPA argues that in these legal proceedings:

> The employer has repeatedly recognized the serious threat to the health and safety of officers and their families from the disclosure of officers' names to members of the public.

I note, therefore, that the TPA appears to be attempting to rely on these decisions not as legal precedent but as evidence. They cannot be received on this basis. Evidence may not be introduced for the first time in final argument. To do so denies the party opposite the chance to challenge, qualify or rebut that evidence.

254. In any event, as noted by the TPSB, these decisions were made in a different statutory context. Further, and more significantly, in each of these cases the Metropolitan Toronto Police Services Board was resisting a request for the names of all police officers. The position taken by that Metropolitan Toronto Police Services Board is well encapsulated in this statement from the Divisional Court decision:

> 22. The Police [i.e. the Metropolitan Toronto Police Services Board] in its submissions to the Inquiry Officer made it quite clear it was not arguing that when approached by someone and questioned an officer on duty should not be required to divulge his name, badge, number, position and duties. The Police draw a distinction between a police officer's name on an official document or his identity when on duty and the identification of the same person as an officer when not on duty. The Police said:
>
> > Had the requester asked for the names of specific individuals who had been involved in specific actions or recorded certain things on behalf of the Service, obviously our response would have been different and we would probably not have objected to the provision of this information.
>
> 23. The Police recognized there are times when it is essential that the names of officers be released to certain individuals or indeed the public. If someone has a legitimate reason for wanting the name of a particular officer or officers he should have it.

255. Similarly, in this case, the wearing of name tags is limited to uniformed officers: it does not extend to plain clothes officers and certainly not to undercover officers. These are the same individuals whose identities the Metropolitan Police Services Board sought to protect in the privacy cases relied upon by the TPA. Accordingly, I do not see that position as being inconsistent with the position of the TPSB before me.

256. Finally, the TPA argues that the risk from wearing name tags has been recognized by other police services. In this respect, it notes that: pursuant to the decision of Arbitrator McLean cited earlier, the Winnipeg Police Service does not require its members to wear tags; as of July 2003 the OPP adopted a policy of voluntary name tags; and the Windsor Police Service used to require police officers to wear name tags but now only requires them to wear an identification number. The TPA also notes that the Centre for Addiction and Mental Health has a policy by which nurses wear name tags revealing their first names only.

257. This is not a compelling argument. Chief Blair's Report identifies many other police services which continue to require their police officers to wear name tags, including the Florida Highway Patrol which has done so since 1939.

**Female Officers and Officers from Ethnic and Religious Minorities**

258. The TPA argues that wearing name tags has a disproportionate impact on female officers and officers from ethnic and religious minorities. These arguments potentially raise challenging questions with respect to the effect of differential allocation of risk. If the evidence established that the wearing of name tags increased the risk for specific identifiable groups of officers, is the appropriate remedy to strike down the name tag policy as a whole or only as it applies to those identifiable groups? What if the wearing of name tags by all officers increased the risk of harm for those specific identifiable groups of officers of the TPS, but, as Dr. Klassen observed one could speculate, decreased it for the TPS as a whole because it increased the overall level of trust and respect for police officers in the community? On the evidence, however, none of these questions need be addressed.

259. With respect to female officers, the TPA asserts, first, that women are at a far greater risk of being victims of stalking and sexual violence than men and, second, that the wearing of name tags increases the risk of stalking. It argues, therefore, that the wearing of name tags has a disproportionate impact on female officers. The evidence supports the first proposition in the argument but not the second. Notwithstanding the evidence of sincerely held subjective concerns of some female officers, as reviewed above the objective expert evidence established no link between the wearing of name tags and the risk of being stalked.

260. With respect to officers from ethnic and religious minorities the TPA posits two concerns. First, it argues that the evidence established that "racialized officers often come from communities that look down on police due to the corruption of police in their countries of origin". In support of this argument it relies upon the evidence of Officer X and the hearsay evidence of Mr. Molyneaux with respect to statements made to him by other police officers. Second, it notes that officers are sometimes required to attend and patrol racially charged events involving disputes between ethnic or religious groups. It argues "if an officer of one of the ethnic or religious groups is required to patrol such an event wearing a name tag, this puts the officer at added risk."

261. The first argument appears to be concerned with the ability of members of a particular community to identify a police officer as a fellow member of that community. There are a number of difficulties with this argument. First, it is not at all clear that members of a particular ethnic or religious minority community need to know the name of an individual in order to identify him or her as a fellow member of the community. While the result obviously may differ depending on the ethnic or religious minority community involved, the only evidence before me related to Officer X. Officer X's evidence was that for the majority of people from his/her country of origin, his/her appearance identifies him/her as a member of the Y Community. Second, while members of a particular community may look down upon a member of their own community who chooses to serve society as a police officer, disapproval, even to the point of contempt, does not constitute a risk to the health and safety of a police officer. This is no different from what all police officers, unfortunately, sometimes experience while walking a beat. Even with respect to Officer X, there is no suggestion in the evidence before me that he/she faced threats or assaults from members of his/her community at large. Rather, Officer X's concerns related to gangs from his/her community when he/she engaged them in the course of policing activities.

262. The second argument is concerned with threats to officers not from members of one's own community, but from members of another community antagonistic to that community. The

particular context is being required to attend and patrol charged events involving disputes between the two ethnic or religious communities. The TPA relies upon the evidence of Mr. Molyneaux and argues that Deputy Derry's denials of increased risk in these circumstances are not plausible.

263. Mr. Molyneaux's provided no evidence with respect to risk of harm to officers in these circumstances. Rather, his evidence on this point was simply that officers have asked not to be part of such events because of their origins. To the extent that such requests are granted, obviously there can be no argument that the officer has been exposed to increase risk.

264. As noted above, in cross examination Deputy Derry specifically denied that in a demonstration arising from the dispute between Serbs and Kosovars that an officer with an identifiably Kosovar name would be at risk from the Serbs. The officer, he testified, would clearly be identified, might be taunted or even sworn at, but he did not accept that constitutes placing the officer at risk. The basis for this evidence was his knowledge of the experience of some of his officers who were Jamaican in dealing with a Jamaican crowd.

265. The only evidence before me on this point, therefore, is Deputy Derry's evidence that officers may be taunted or sworn at. Again, this is, unfortunately, part of the policing experience. There was no evidence to suggest that verbal abuse constitutes a material risk to health and safety of police officers.

266. On the other hand, if I reject Deputy Derry's evidence, as urged by the TPA, then I simply have no evidence at all with respect to any risk of harm to officers in these circumstances.

267. To be clear, I am deciding this issue on the basis of the evidence of the circumstances before me. It may be that a different conclusion would be reached with respect to a Kosovar police officer in Serbia during the height of that conflict. Fortunately, that is not the world within which we live. It may be that in a particular case it would be appropriate for the TPS to accommodate an officer whose origins lie within a particular community by not assigning him or her to attend or patrol a particular event, as apparently has sometimes been done. These questions are not before me, and I express no opinion one way or the other on any of them. But on the evidence before me I am not prepared to find that the general requirement that uniformed members of the TPS display their names on their outer garments constitutes a failure of the TPSB to take every precaution reasonable in the circumstances for the protection of a worker.

**The Physical Hazard of Metal Name Tags**

268. As noted, when first introduced, the name badges were of shiny gold metal material, rectangular and affixed to the officer's uniform by the means of two pins capped after they were passed through the cloth of the uniform. The TPA filed sixteen "Injured on Duty Reports" describing injuries sustained by officers as a result of wearing the metal name badges. In most of the incidents, the officer cut a finger or a knuckle on a sharp corner or edge of the name badge while reaching for something in their pocket. In a few, the cut was caused by an exposed pin while the officer was reaching for their pocket or pulling an article of clothing over their head. In a few of the incidents, the officer punctured a finger on one of the pins of the name badge while attempting to affix it to their uniform. In a few cases the officer cut their hand on their own name badge during an attempt to restrain an individual. In one case, the officer was scratched on the face by the name badge of another officer while the two of them attempted to restrain an

individual. All of these incidents occurred in the first several months after the name badges were introduced. Only one of them was followed by a visit to a doctor or a hospital. In that case, the officer had sustained other injuries to his hand during the attempt to restrain an individual.

269. In March 2007 the TPSB announced that it would transition to cloth name tags, to be affixed to uniforms by Velcro. Members were given the option of wearing a cloth name tag or their metal name badge, except that the metal name badge was required to be worn with dress uniform. Mr. Molyneaux testified that his sense was that approximately fifty percent of members continued to wear the metal name badges.

270. Members of the TPS receive vouchers for dry cleaning their uniforms. They were given additional vouchers which could be used to have the necessary Velcro backing attached to their uniforms. Without the vouchers the cost of having the Velcro backing attached was $1 per article of clothing. Mr. Molyneaux testified that it would have taken a year before a member would have sufficient vouchers to have the Velcro backing attached to every article of clothing which might be worn as part of their uniform. Deputy Derry stated it would take three months.

271. The TPA argues that Deputy Derry acknowledged that the TPA had raised the prospect of the shiny metal name badges acting as a target and that it might fragment if struck by a bullet. He also agreed that the TPSB did no testing of the metal name badges in relation to these concerns. On this basis it argues that the TPSB's refusal to issue an order banning the use of metal name badges constitutes a breach of the Act in that the wearing of those name badges causes an increased risk to the health and safety of the workers.

272. There is no merit to this argument. The risk of cuts posed by the metal badges is trivial and can be avoided by a member choosing to wear the cloth name tags instead. The fact that the TPA expressed concerns that the shiny metal name badges act as a target and might fragment if struck by a bullet does not constitute evidence that there is a material risk that either of these things will happen. The onus is upon the TPA to adduce such evidence before the Board. Indeed it is not simply that there is no evidence of such a risk, but that the evidence before the Board suggests that there is no such risk. Deputy Derry testified that he was charged with investigating the choice of materials for the name tags. He recommended use of a metal name badge similar to the metal badge used by the OPP for either the officer's name or number. Chief Blair's Report indicates that the OPP had had no issues with the wearing of these badges. Deputy Derry stated that he had canvassed hundreds of police organizations across North America and that concerns about metal name tags creating a risk of being shot had never been raised as an issue.

## Summary and Disposition

273. Without limiting the reasons above, I provide the following summary of some of the main points.

274. Section 25(2)(h) of the Act requires an employer to take every precaution reasonable in the circumstances for the protection of a worker. In assessing whether TPSB's requirement that the uniformed members of the TPS wear name tags breaches this obligation, consideration must be given to the particular circumstances of the TPS. Those circumstances include the fact that policing is an inherently dangerous profession and that during the course of their duties police

officers' names can and do become known to members of the public in a myriad of ways quite apart from name tags.

275. While police officers are subjected to taunts and threats, few of these threats are serious and, fortunately, far fewer escalate to the level of violence or stalking.

276. Many of these threats are from mentally ill individuals or are made in the spur of the moment by other members of the public having an interaction with the police. To the extent that these constitute a risk to health and safety of police officers, it is inherent to the work. There is no evidence that the individuals making such threats have used an officer's name, however obtained, to gather personal information about the officer for the purpose of making further threats or taking other actions against the officer. The evidence does not establish that the frequency or severity of these threats has increased as a result of the use of name tags.

277. Organized crime and motorcycle gangs do maintain data banks containing personal information in relation to police officers. This information may well serve to make policing activities less effective: it is unlikely that a known police officer will be able to work undercover with a gang or organized crime. There is no cogent evidence, however, that this information has been used to threaten or assault police officers. Further, to the extent that organized crime and motorcycle gangs wish to obtain that information about an officer, they were not deterred by the absence of a name tag. Accordingly, I conclude that the evidence does not establish that the presence of a name tag increases the risk of harm to police officers from organized crime or gangs.

278. In a very few cases police officers, in particular female officers, have been subjected to stalking. While the risk of harm in these cases is severe, the evidence does not establish that name tags affect the likelihood or outcomes of stalking.

279. The evidence does not establish that the wearing of name tags has materially increased the risk of harm to either female officers or officers from ethnic or racial minorities.

280. The evidence does not establish any material risk of harm from the optional wearing of metal name tags.

281. Policing is an inherently risky profession. Some of those risks relate to police officers being identified. The TPS has adopted a number of risk reduction strategies designed to mitigate that risk. Some residual risk remains. The residual risk relates to events of uncertain occurrence with uncertain outcomes, only some of which are harmful, the average frequency of which, based on past experience, is fortunately very low. The evidence does not establish that the wearing of name tags has been related to any material increase in that risk.

282. For all of the reasons given in this decision, the appeal is dismissed.

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**2782-09-R The Utility Contractors Association of Ontario Incorporated,** Applicant v. Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions 183, 247, 493, 527, 607, 625, 837, 1036, 1059, 1081 &

1089, Responding Party v. Sewer and Watermain, Curb, Gutter and Sidewalk Contractors' Section of the London and District Construction Association; Universal Workers Union, Labourers' International Union of North America, Local 183; Labourers' International Union of North America, Local 625; Labourers' International Union of North America, Local 1059; and Labourers' International Union of North America, Local 1089, Intervenors

**Accreditation – Construction Industry – Employer – Practice and Procedure – Section 136 of the Act requires the Board to find a "double majority" – The "employer majority" is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule "E" list – The "employee majority" is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application – The applicant Association filed evidence that it represented 11 of 38 employers on the Preliminary Schedule "E" List – The applicant, responding party union and intervening union all supported the position that where an employer does not make an Employer Filing, it must be removed from Schedule "E" – The Board however found that the lack of an Employer Filing was insufficient to remove an employer from Schedule "E" – The Board noted that no party had suggested that the 27 employers should be removed from Schedule "E" because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date – Finally, the Board found that nothing in its Rules or in the warning to employers that if they do not make an Employer Filing they may be deemed to accept all of the facts in the Application, relieves the applicant from establishing the statutory prerequisites required – Since the applicant filed evidence of representation for 11 employers and the Final Schedule "E" was composed of 38, the applicant failed to establish the "employer majority" set out in s. 136(2)(a) – Application dismissed**

**BEFORE**: *Lee Shouldice*, Vice-Chair.

**APPEARANCES:** *Carl Peterson* and *Barry Brown* for the applicant; *S.B.D. Wahl* for Labourers' International Union of North America, Ontario Provincial District Council; *Sean McFarling* and *Jack Oliveira* for Universal Workers Union, Labourers' International Union of North America, Local 183; *Stephen Krashinsky* for Labourers' International Union of North America, Locals 625, 1059 and 1089; *M. Patrick Moran* and *Dan Toppazzini* for Utility Installations Ltd.

**DECISION OF THE BOARD:** December 20, 2010

1. This is an application for accreditation filed with the Board pursuant to the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 ("the Act"). The applicant, the Utility Contractors Association of Ontario Incorporated, seeks to be accredited as the bargaining agent for certain employers who have a bargaining relationship with the responding party, the Labourers' International Union of North America, Ontario Provincial District Council.

2. The process by which an applicant such as the Association becomes accredited is set out in sections 134-136 of the Act. These sections of the Act provide as follows:

**134.** Where a trade union or council of trade unions has been certified or has been granted voluntary recognition under section 18 as the bargaining agent for a unit of employees of more than one employer in the construction industry or where a trade union or council of trade unions has entered into collective agreements with more than one employer covering a unit of employees in the construction industry, an employers' organization may apply to the Board to be accredited as the bargaining agent for all employers in a particular sector of the industry and in the geographic area described in the said certificates, voluntary recognition documents or collective agreements, as the case may be.

**135.** (1) Upon an application for accreditation, the Board shall determine the unit of employers that is appropriate for collective bargaining in a particular geographic area and sector, but the Board need not confine the unit to one geographic area or sector but may, if it considers it advisable, combine areas or sectors or both or parts thereof.

(2) The unit of employers shall comprise all employers as defined in section 126 in the geographic area and sector determined by the Board to be appropriate.

**136.** (1) Upon an application for accreditation, the Board shall ascertain,

> (a) the number of employers in the unit of employers on the date of the making of the application who have within one year prior to such date had employees in their employ for whom the trade union or council of trade unions has bargaining rights in the geographic area and sector determined by the Board to be appropriate;
>
> (b) the number of employers in clause (a) represented by the employers' organization on the date of the making of the application; and
>
> (c) the number of employees of employers in clause (a) on the payroll of each such employer for the weekly payroll period immediately preceding the date of the application or if, in the opinion of the Board, the payroll period is unsatisfactory for any one or more of the employers in clause (a), such other weekly payroll period for any one or more of the said employers as the Board considers advisable.

(2) If the Board is satisfied,

> (a) that a majority of the employers in clause (1) (a) is represented by the employers' organization; and
>
> (b) that such majority of employers employed a majority of the employees in clause (1)(c),

the Board, subject to subsection (3), shall accredit the employers' organization as the bargaining agent of the employers in the unit of employers and for the other employers for whose employees the trade union or council of trade

> unions may, after the date of the making of the application, obtain bargaining rights through certification or voluntary recognition in the appropriate geographic area and sector.
>
> (3) Before accrediting an employers' organization under subsection (2), the Board shall satisfy itself that the employers' organization is a properly constituted organization and that each of the employers whom it represents has vested appropriate authority in the organization to enable it to discharge the responsibilities of an accredited bargaining agent.

3. On the basis of the materials filed with the Board, the Board finds that the applicant is an employer's organization within the meaning of subsection 1(1) of the Act and section 126 of the Act, and further that it is a properly constituted organization for the purposes of section 134 of the Act.

4. The responding party is a trade union within the meaning of subsection 1(1) of the Act and section 126 of the Act which has acquired bargaining rights for a unit of employees of more than one employer in the construction industry who fall within the bargaining unit described below.

5. The Board is satisfied, having regard to the agreement of the parties and the submissions made by the parties at the hearing convened in this proceeding, that the following unit of employers is appropriate for collective bargaining:

> all employers of construction employees engaged in utility construction for whom the Labourers' International Union of North America, Ontario Provincial District Council and its affiliated local unions, 183, 247, 493, 527, 607, 625, 837, 1036, 1059, 1081, and 1089 has bargaining rights in the province of Ontario in the residential, pipeline, heavy engineering, the sewers and watermains, the roads, and the electrical power systems sectors of the construction industry save and except employers bound by and performing work under any of the following collective agreements:
>
> (a) The collective agreement between The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity and the Labourers' International Union of North America, Local 183;
>
> (b) The collective agreement between the Metropolitan Toronto Apartment Builders' Association and the Labourers' International Union of North America, Local 183;
>
> (c) The collective agreement between the Toronto Residential Construction Labour Bureau and the Labourers' International Union of North America, Local 183;
>
> (d) The collective agreement between the Residential Framing Contractors Association of Metropolitan Toronto and Vicinity and the Labourers' International Union of North America, Local 183;
>
> (e) The collective agreement between the Ontario Concrete and Drain Contractors Association and the Labourers' International Union of North

America, Local 183 and International Union of Operating Engineers, Local 793;

(f) The collective agreement between the Ontario Formwork Association and The Formwork Council of Ontario;

(g) The collective agreement between the Restoration Contractors Association of Ontario and the Labourers' International Union of North America, Local 183;

(h) The collective agreement between the Masonry Contractors' Association of Toronto Inc., and the Bricklayers, Masons Independent Union of Canada, Local 1 and the Labourers' International Union of North America, Local 183 and the Masonry Council of Unions of Toronto and Vicinity;

(i) The collective agreement between the Heavy Construction Association of Toronto and Labourers' International Union of North America, Local 183;

(j) The collective agreement between the Landscaping Contractors in Ontario Labour Relations Board Area Nos. 8 and 18 and the Labourers' International Union of North America, Local 183;

(k) The collective agreement between the Metropolitan Toronto Road Builders' Association and A Council of Trade Unions acting as the representative and agent of Teamsters' Local 230 and Labourers' International Union of North America, Local 183;

(l) The collective agreement between the Metropolitan Toronto Sewer and Watermain Contractors' Association and A Council of Trade Unions acting as the representative and agent of Teamsters' Local 230 and Labourers' International Union of North America, Local 183;

(m) The collective agreement between the Residential Carpentry Contractors' Association of Greater Toronto and the Labourers' International Union of North America, Local 183;

(n) The collective agreement between various independent marble, tile, terrazzo and cement masons contractors and the Labourers' International Union of North America, Local 183;

(o) The collective agreement between the Electrical Power Systems Construction Association and the Labourers' International Union of North America, Ontario Provincial District Council;

(p) The collective agreement between various civil contractors and the Labourers' International Union of North America, Ontario Provincial District Council (the "Provincial Civil Engineering Collective Agreement");

(q) The Labourers' Mainline Pipeline Agreement for Canada between the Pipeline Contractors Association of Canada and the Labourers' International Union of North America, Ontario Provincial District Council;

(r) The Labourers' Distribution Pipeline Agreement for Canada between the Pipeline Contractors Association of Canada and the Labourers' International Union of North America, Ontario Provincial District Council;

(s) The collective agreement between Sewer and Watermain, Curb, Gutter and Sidewalk Contractors' Section of the London and District Construction Association and the Labourers' International Union of North America, Local 1059;

(t) The collective agreement between the Del-Ko Paving & Construction Company Limited; TCG Asphalt & Construction Inc. and Dufferin Construction Company, Divisions of Holcim (Canada) Inc.; Coco Paving Inc.; and Capital Paving Inc. and the Labourers' International Union of North America, Local 1059;

(u) The collective agreement between the Heavy Construction Association of Windsor and the Labourers' International Union of North America, Local 625;

(v) The collective agreement between the Sarnia Heavy Construction Association and the Labourers' International Union of North America, Local 1089;

(w) The collective agreement between the National Capital Roadbuilders' Association and the Labourers' International Union of North America, Local 527;

(x) The Heavy Civil Construction Collective Agreement between the Sudbury Construction Association and the Labourers' International Union of North America, Local 493;

(y) The collective agreement between various civil engineering construction contractors and the Labourers' International Union of North America, Local 1036 (the "Civil Engineering Collective Agreement");

(z) The collective agreement between various civil engineering construction contractors and the Labourers' International Union of North America, Local 607 (the "Civil Engineering Collective Agreement");

(aa) The collective agreement between Jerry's Asphalt Paving; K & H Asphalt Sealing and Striping; Larry's Asphalt Paving Co. Ltd.; West London Paving Ltd.; 638541 Ontario Limited o/a Wilson's Asphalt Paving; and Pyramid Paving (2006) Limited and the Labourers' International Union of North America, Local 1059;

(bb) The collective agreements between Felimore Electrical Contractors Ltd.; Black & McDonald Ltd.; Guild Electric Limited; Stacey Electric Co. Ltd.; Tri-Star Electric Inc. and the Universal Workers Union, Labourers' International Union of North America, Local 183;

(cc) The collective agreement between the National Capital Road Builders' Association and a Council of Trade Unions consisting of the International Union of Operating Engineers, Local 793, the Labourers International Union

> of North America, Local 527 and Teamsters Local Union 91 affiliated with the International Brotherhood of Teamsters; and
>
> (dd) The collective agreement between Utility Installation Ltd./Weimann Electric Ltd. and Labourers International Union of North America, Local 837.

6. By way of decision dated July 13, 2010, the Board directed the applicant to cause a notice to any affected contractors to be placed in the Daily Commercial News and other area newspapers. Counsel for the applicant has advised the Board that the applicant did so.

7. The parties did not agree upon a list of employers constituting a Final Schedule "E" to this application. Schedule "E" is the list of employers defined by section 136(1)(a) of the Act; that is, the employers who, within one year before December 14, 2009, the date of the making of this application, had employees in their employ for whom the responding party had bargaining rights in the bargaining unit determined above.

8. The responding party filed with its response a Preliminary Schedule "E" list that contained the names of 49 entities. After the applicant made certain revisions to its proposed bargaining unit, the responding party filed an amended Preliminary Schedule "E" list containing the names of 39 entities. Notice was provided to these 39 entities in accordance with the Board decision dated July 13, 2010. An issue was raised by one of those contractors, Utility Installation Ltd./Weimann Electric Limited. That issue was dealt with by the parties immediately prior to the outset of this hearing. Accordingly, as at the outset of the commencement of the hearing, the Preliminary Schedule "E" list was composed of the names of 38 entities.

9. Section 136 of the Act requires the Board to find a "double majority". The "employer majority" is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule "E" list. The "employee majority" is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application. The Board must be satisfied that the applicant represents both majorities.

10. The applicant has filed with the Board documentary evidence establishing that it represents 11 of the 38 employers on the Preliminary Schedule "E" list. This does not satisfy the requirement that the applicant demonstrate that it is entitled to represent a majority of the employers in the appropriate bargaining unit. I raised this issue with the parties during the course of the hearing. Counsel for the applicant noted that all of the employers on the Preliminary Schedule "E" list had been provided with notice of this application and had been advised of their right to file an Employer Filing, Application for Accreditation, Construction Industry (Form A-94), which filing was to include a Schedule "H" containing the names of employees said to have been employed by those companies in the bargaining unit during the week immediately preceding the application date. With the exception of Utility Installations Ltd./Weinmann Electric Ltd. (which no longer has an active interest in this proceeding), the only employers on the Preliminary Schedule "E" list that filed an Employer Filing with the Board were the 11 employers represented by the applicant.

11. Counsel for the applicant asserted that for the purposes of calculating the "employer majority" portion of the double majority, the Board has developed a practice of including only

those employers that file an Employer Filing. That is, counsel in effect submitted that the Board had disregarded for the purpose of determining the employer portion of the double majority requirement those employers that had failed to submit an Employer Filing even when there was information before the Board that those employers in the year prior to the application filing date had in fact employed employees in the bargaining unit for whom the responding party held bargaining rights. Accordingly, counsel for the applicant asserted that for the purposes of establishing the employer majority portion of the double majority, his client had secured 100 percent of the employers on a list of 11 entities that should constitute the Final Schedule "E" list. Counsel for the responding party agreed with this assertion. Counsel for the intervenors adopted the position taken by counsel for the responding party.

12. In light of the express wording of section 136(2) of the Act, I had significant concerns about the position adopted by the parties. Subsequent to the completion of the hearing I was unable to confirm the practice asserted by counsel. I thereupon sought written submissions from the parties regarding this practice. Any party who desired to do so was invited to file with the Board written submissions directed to the question of whether the applicant has established the "employer majority" required by subsection 136(2)(a) of the Act. Submissions were filed by the parties and I have reviewed and considered them.

13. The applicant states that at no time did it accept the Preliminary Schedule "E" list put forward by the responding party as the Final Schedule "E" for the purposes of the count required by section 136 of the Act. It asserts that the purpose of that Preliminary Schedule "E" is to identify those entities that may have an interest in the proceeding as a result of a collective agreement, voluntary recognition agreement or Board certificate, so as to ensure that they are provided adequate notice of the application. The applicant states that the Final Schedule "E" list ought to include only the names of those entities that made the appropriate Employer Filing and indicated that they employed employees within the time period reflected by section 136 of the Act. Accordingly, it is asserted that the names of the employers who were listed on the Preliminary Schedule "E" put forward by the responding party that did not make an Employer Filing ought to be deleted and not counted for the purposes of the section 136 count.

14. The applicant asserts that its analysis is buttressed by the Board's Rules of Procedure, which provide in Rule 23.4 and in Rules 23.6 through 23.11 that any employer receiving notice of the application as a result of being included on the Preliminary Schedule "E" must make an Employer Filing on or before the employer response date set by the Registrar. It notes that the responding party is not required to provide the information that normally is contained in the Schedule "H" documents filed with the Board.

15. The applicant notes that the Board has the statutory obligation under section 136 of the Act to determine the Final Schedule "E" after receiving the Employer Filings. It observes that Rule 23.10 of the Board's Rules indicates that the Board will not consider oral evidence of representation or of objections or that employers no longer with to be represented by an accredited employers' organization, except to identify or to substantiate the evidence. The applicant further notes that employers who receive the notice documentation are "warned … that if they do not file Form A-94 and Schedule "H" and/or appear at the hearing, they will not be entitled to lead any evidence or make any objections to the application". Accordingly, the applicant asserts that its position is appropriate.

16. In support of its position, the applicant relies upon the following 20 decisions: *Mechanical Contractors Association Hamilton*, [1972] OLRB Rep. November 923; *The Mechanical Contractors Association of Ottawa*, [1973] OLRB Rep. 99; *The General Contractors' Section of the Toronto Construction Association*, [1973] OLRB Rep. March 131; *The Terrazzo Tile and Marble Guild of Ontario*, [1973] OLRB Rep. March 150; *Metropolitan Plumbing and Heating Contractors Association, a division of The Mechanical Contractors Association of Toronto*, [1973] OLRB Rep. April 199; *Ontario Precast Concrete Manufacturers' Association, Erectors Division*, [1973] OLRB Rep. June 321; *Labour Bureau of The Painting and Decorating Contractors of Ontario*, [1973] OLRB Rep. June 359; *The Ontario Erectors Association*, [1973] OLRB Rep. August 444; *Mechanical Contractors Association Niagara*, [1973] OLRB Rep. September 477; *Association of Millwrighting Contractors of Ontario*, [1973] OLRB Rep. October 545; *Labour Bureau of the Painting and Decorating Contractors of Ontario*, [1974] OLRB Rep. February 81; *Kitchener-Waterloo Construction Association*, [1974] OLRB Rep. March 139; *The General Contractors' Section, Toronto Construction Association*, [1975] OLRB Rep. 134; *Metropolitan Toronto Sewer and Watermain Contractors Association*, [1985] OLRB Rep. December 1763; *National Capital Roadbuilders Association*, [1988] OLRB Rep. June 604; *National Capital Roadbuilders Association*, [1988] OLRB Rep. October 1041; *National Capital Roadbuilders Association*, [1989] OLRB Rep. January 31; *The Electrical Contractors' Association of Ottawa*, [1989] OLRB Rep. April 344; *Metropolitan Toronto Sewer and Watermain Contractors Association*, [1989] OLRB Rep. December 1226; and *Electrical Power Systems Construction Association*, [2009] OLRB Rep. July/August 548.

17. The applicant states that the Board's practice with respect to the preparation of a Final Schedule "E" was set out in the *Mechanical Contractors Association Hamilton* decision, cited above, and has been followed ever since, particularly in the other cases it cites above. With respect to *Mechanical Contractors Association Hamilton*, the applicant notes that in that proceeding the Board removed from the Preliminary Schedule "E" list 11 of the 13 employers identified thereon who did not make the necessary filings. One particular employer was removed from the Preliminary Schedule "E" list notwithstanding that the responding party union had submitted a collective agreement indicating it had bargaining rights for the employer, because the Board had no basis for finding that the employer had employees within the year immediately preceding the making of the application.

18. The applicant also relies upon an earlier decision of the Board, *General Contractors Section of the Toronto Construction Association*, [1971] OLRB November 719, where the Board moved 82 of the employers listed on a Preliminary Schedule "E" to the Schedule "F", since their filings indicated that they had no employees during the year preceding the making of the application, and moved five employers to the Final Schedule "E" from the revised Schedule "F" because those five entities had employees on their payrolls during the year immediately preceding the application.

19. The applicant asserts that section 136 of the Act mandates the Board to ascertain the Final Schedule "E" based on the material before it. It is the applicant's assertion that based on the Employer Filings before the Board the applicant has established the required employer majority, because any employer on the Preliminary Schedule "E" that did not make an Employer Filing must be deleted from that Schedule.

20. The responding party in its submissions reiterates a number of the points raised by the applicant. It notes that neither section 136 of the Act nor the Board's Rules of Procedure requires the responding party to prepare a comprehensive list of employers for whom it holds bargaining rights in the form of a Preliminary Schedule "E" or a Schedule "F". It is only the Form A-93 Response that requests the responding party to prepare a Preliminary Schedule "E" and "F". The responding party agrees with the applicant that the Preliminary Schedule "E" is prepared only for the purpose of determining which employers are to receive notice of the application. In this case, the responding party prepared that Preliminary Schedule "E" relying upon benefit remittance forms that it or its affiliates received in the normal course of business. The responding party states that these remittance forms are hearsay documents that assisted it to identify employers that may have employed bargaining unit employees within the one year period prior to the application date. It is these employers who are required to be given notice and who must file Employer Filings by way of a Form A-94 response and Schedule "H" in order to indicate their interest in the proceeding.

21. The responding party also relies upon Rule 23 of the Board's Rules of Procedure. It, like the applicant, states that Rule 23 requires any employer receiving notice of the application to file an Employer Filing before the employer response date. According to the responding party, the Board's Rules stipulate that the Board will not consider oral evidence except to identify or substantiate the employer response evidence filed.

22. The responding party agrees with the applicant that at the hearing of this proceeding the applicant did not agree to the inclusion on the Final Schedule "E" of all employers listed on the Preliminary Schedule "E". According to the responding party, it could not, as a result of Rule 23, offer any evidence to "identify or substantiate" the inclusion of any particular employer on a Final Schedule "E". The responding party states that "out of a concern to preserve and maintain the assertion of bargaining rights and negate any possible argument of abandonment", the responding party did not object to the transfer to Schedule "F" from the Preliminary Schedule "E" any of the employers listed on the Preliminary Schedule "E" that made no Employer Filings.

23. According to the responding party, the Board's consistent practice is to transfer employers listed on a responding party union's Preliminary Schedule "E" to Schedule "F" in circumstances where those employers do not make the required Employer Filings. It agrees with the applicant's analysis of the *Mechanical Contractors Association Hamilton* decision and states that this practice has been consistently followed in all accreditation applications since that decision. The responding party also relies upon the *National Capital Roadbuilders Association* decisions cited by the applicant for the principle that the Final Schedule "E" can be prepared by the Board in the absence of a Final Schedule "F". It states that, similar to the situation reflected by the *National Capital Roadbuilders Association* decisions (in which most of the parties who would participate in the determination of the Final Schedule "F" had no interest in the proceedings dealing with the development of the Final Schedule "E"), the employers in this proceeding listed on the responding party's Preliminary Schedule "E" that did not make the Employer Filings "have indicated that they have 'no interest' in the accreditation application after due and proper notice". As in the *National Capital Roadbuilders Association* decisions, the responding party states that the failure to make the required Employer Filings should permit the Board to conclude that those entities ought to be transferred to the Schedule "F" list of employers.

24. In a brief submission, counsel for Universal Workers Union, Local 183 adopted the submissions of the applicant and the responding party. In addition, he noted that, in the absence of an explicit agreement of the parties, the Preliminary Schedule "E" filed by the responding party cannot be determined to be final and accurate. Counsel draws as a parallel the determination of an application for certification based solely upon the Schedule "A" list of employees filed by a responding party employer without regard to any challenge made by the applicant union or affected employees.

25. I have read the cases relied upon by the applicant and the responding party, and their submissions. With five exceptions, none of the cases cited by the applicant come close to supporting the assertion that the Final Schedule "E" list ought to contain only the names of those employers that make an Employer Filing with the Board. In fact, the vast majority of the cases relied upon by the applicant and the responding party are entirely irrelevant to the question at issue.

26. As noted, there were some exceptions. The lynchpin of the applicant's argument, *Mechanical Contractors Association Hamilton*, is one of them. That decision was one of the earliest applications made to the Board for an accreditation certificate after the accreditation provisions of the Act came into force in 1971. Not surprisingly, the Board's decision describes in considerable detail the accreditation process adopted by the Board at that time. It notes, for example, that lists were filed by the applicant and the responding party trade union and that Schedule "E" and Schedule "F" lists were put together by the Board after a Board examiner consulted with the parties. As pointed out by the parties to this proceeding, these lists were used to provide notice of the application to potentially interested parties. However, the Board noted, at paragraph 23, that the schedules "also make a preliminary assessment as to which employers fall into the category of employers set out in section 115(1)(c) [now section 134(1)(c)] as the employers who determine the representative status of the applicant".

27. In *Mechanical Contractors Association Hamilton* the Board addressed the possibility that some employers might take the position that they had no representations to make concerning the application, and thus would ignore the mandatory directive contained in the Board's Rules to file what was then called an "Employer Intervention" and a completed Schedule "H". In these circumstances, the Board described, at paragraph 24, the approach it would take:

> The result is that the Board would not have sufficient materials before it to make the determination required in section 115(1) [now section 134(1)] of the Act. The Board has therefore adopted the practice of utilizing its field staff to contact the various employers who have failed to make the required filings, in attempts to obtain the necessary information. This information is then treated as the representations of the individual employers with respect to the various matters to be dealt with by the Board.

The Board noted in that same paragraph that despite the repeated efforts of its staff there remained a number of employers that had not or would not make the filings required by the Board's Rules. In those circumstances, and in light of the fact that the employers had been warned that the Board may dispose of the application on the basis of the materials then before it if an employer failed to make the required filings, the Board proposed "to rely on the representations and filings of the applicant and the respondent in order to make the determinations required by the Act".

28. The Board identified that of the 67 employers on the revised Schedule "E" and the 52 employers on the revised Schedule "F", 13 employers did not make a filing with the Board. The applicant and by the responding party agreed that 11 of the 13 employers should be removed from the list, 2 from the Schedule "E" list and 9 from the Schedule "F" list. One employer that was served with notice of the application failed to file an employer intervention. The responding party established its bargaining rights with that employer, but the Board had "no basis for finding that this employer has had any employees within the year immediately preceding the making of this application". Accordingly, that employer was included on the Final Schedule "F".

29. Ultimately, on the basis of all of the evidence before the Board, the Association was provided with a certificate of accreditation.

30. The first two *National Capital Roadbuilders Association* decisions (*National Capital Roadbuilders Association No. 1*, reported at [1988] OLRB Rep. June 604, and *National Capital Roadbuilders Association No. 2*, reported at [1988] OLRB Rep. October 1041) also have some relevance to the question in issue in this proceeding. The critical issue in that proceeding was whether the Board was required to or should continue the practice of compiling a Final Schedule "F".

31. Prior to deciding that issue, the Board found that the applicant had established the statutory double majority. In the course of making that determination, the Board found that the Final Schedule "E" consisted of the names of 23 employers. Notice had been sent to 266 employers for whose employees the responding party union claimed to hold bargaining rights. Of those 266 employers, 85 made an Employer Filing by way of what is now the Form A-94, and five filed a letter reply with the Board. The Board ultimately made its findings based upon the representations in all of the pleadings filed and made to the Board at the hearing with respect to those pleadings. Of the 90 employers that responded by filing what is now the Form A-94 or a letter, 51 denied that the union held bargaining rights, and 23 acknowledged that the union did represent its employees. Three other employers disputed their placement on the Schedule "E" and were removed from that Schedule by the Board. As a result, the final Schedule "E" consisted of the names of 23 employers – and it was against this list of 23 employers that the support of the applicant was determined. This is an approach that is consistent with that proposed by the parties in this proceeding, assuming that all 23 employers also filed a Schedule "H". It is unclear from the decision whether that was in fact the case.

32. As noted above, in *National Capital Roadbuilders Association No. 2* the Board considered the issue of whether the Board was required to or should continue the practice of compiling a Final Schedule "F". Ultimately, the Board concluded that it was unnecessary to do so. In the course of its reasons for decision, the Board made a number of observations regarding how the accreditation provisions of the Act are applied by the Board. At paragraph 10, the Board made the following observations:

> 10. It was clearly intended that Schedules "E" and "F" together comprise an exhaustive list of all employers for whose employees the union claims to hold the requisite bargaining rights. ... Schedules "E" and "F" serve a dual purpose. First, they are the principal source of the names of employers to whom the Board directs notice be given in Form 93 pursuant to section 110 of the Rules. *Second, they serve as the respondent union's pleadings respecting two matters: the identity of the employers for whose*

> *employees it claims to hold the requisite bargaining rights and, which of those employers has such employees in their employ within one year prior to the application date. The union's assertions in both matters are generally accepted unless specifically challenged by a party.* Once the Board has made that final determination, it has designated the lists Final Schedule "E" and Final Schedule "F". (emphasis added)

After effecting the calculations identified above, the Board noted that, for it to compile a Final Schedule "F", it would have to decide the responding union's claim that it was the bargaining agent for employees employed by 244 employers employed on the Schedules "E" and "F" filed by the union. It was unnecessary for the Board to make those determinations in order to decide whether a certificate of accreditation ought to be issued, because the composition of the Final Schedule "E" list was not in dispute.

33. There are a handful of other decisions of the Board that speak to the issue raised in this proceeding. In *The Electrical Contractors' Association of Ottawa*, [1989] OLRB Rep. April 344, the names of 27 employers that failed to make Employer Filings were added to the Schedule "E" list on the basis of information provided to the Board at the hearing by the applicant and the respondent that satisfied the Board that those names were properly on that list. In *Electrical Power Systems Construction Association*, [2009] OLRB Rep. July/August 548, the parties agreed that 13 employers were in the bargaining unit as of the application filing date. Of those 13, 12 employers made Employer Filings and were maintained on the Schedule "E" list. The 13th employer was removed from the Schedule "E" list and was made the sole addition to the Schedule "F" list. The Board was prepared to conclude that that entity did not have any employees affected by the application within the one year immediately prior to the application filing date because there was no information at all before the Board regarding that entity, either from the responding party union or from the employer itself in the form of an Employer Filing.

34. Finally, there is one decision that runs expressly contrary to the assertion made by the applicant and the responding party. In *International Brotherhood of Electrical Workers, Local 105*, 2006 CanLII 35853, the parties agreed upon the identity of the names of employers that constituted the Final Schedule "E" list. That list contained 20 names. The applicant had filed with its application authorizations on behalf of 13 of those employers, and therefore satisfied the "employer majority" portion of the double majority. What is significant about the decision for the purpose of this proceeding is that only 7 of the 20 employers on the Final Schedule "E" list made Employer Filings. The parties did not apply the asserted consistent practice of the Board and only list those seven employers on the Schedule "E" list that made Employer Filings. Six other employers were included on the Schedule "E" list.

35. As is evident from the review of the Board's jurisprudence set out above, there is no practice of the Board in the nature of that asserted by the parties. There is no decision that expressly adopts that practice. In *Electrical Power Systems Construction Association* the Board did move one employer that did not make an Employer Filing to the Schedule "F" list, but in that case the responding party union did not assert at any time that the entity was properly on the Schedule "E" list. That is, unlike the responding party in this proceeding, the responding party in *Electrical Power Systems Construction Association* did not assert that the one employer that had not submitted the Employer Filing did not employ anyone in the bargaining unit during the one year period immediately prior to the date the accreditation application was filed. There is one decision, *International Brotherhood of Electrical Workers, Local 105*, that adopts an approach

contrary to the asserted practice. The results reflected in the other decisions were largely driven by agreements reached by the parties, by findings of the Board that the parties were content to agree with, or by way of investigations by Officers into the circumstances of individual employers listed on the Preliminary Schedule "E", investigations that the Board no longer conducts. It is clear that the parties to this proceeding cannot rely upon a long-standing practice of the Board to justify the approach they want to adopt in this proceeding. No such practice exists.

36. The question still remains whether the applicant has established that it represents a majority of the employers in the unit of employers who have within one year of the application filing date had employees in their employ for whom the responding party trade union has bargaining rights. Those employers are identified by the responding party at first instance by their placement on the Preliminary Schedule "E" list. The Preliminary Schedule "E" list as it currently stands contains the names of 38 employers. The applicant has only filed with the Board evidence that it represents 11 of those 38 employers. Should the Board apply the approach proposed by the applicant and the responding parties, and provide the applicant with an accreditation certificate on the basis of a Final Schedule "E" list composed of only the 11 employers that made an Employer Filing with the Board?

37. The consequence of adopting such an approach is that the employer majority requirement mandated by the Act will be established in many cases by an applicant that has far less than majority support. The requirement in the Act that an applicant secure an employer majority is significant and not merely a technicality. In *Association of Millwrighting Contractors of Ontario*, [1973] OLRB Rep. October 545, the Board noted, in the face of an argument made by two employers that being included within an accredited bargaining unit may cause them hardship, that:

> the possible hardship referred to by these employers is well within the legislative intent of the accreditation provisions of the Act, and is no doubt part of the justification for the rigorous requirements set out in section 115 [now section 136] of the Act. (at para. 6)

The statutory requirements are rigorous for a reason. Upon accreditation, all of the rights, duties and obligations under the Act of employers for whom the applicant becomes the bargaining agent devolve to the applicant. An accreditation certificate would, for example, prohibit any one of the employers in the bargaining unit from directly bargaining with the responding party regarding its employees. An employer who does not want to be represented by the applicant has no choice in the matter – there is no mechanism for it to opt out. I interpret the Act with respect to the calculation of the employer majority with the above-referenced consequence of accreditation in mind.

38. It is important at this juncture to further consider the purpose of the Preliminary Schedule "E" prepared and filed by the responding party. The applicant and the responding party assert that the Preliminary Schedule "E" is prepared by the responding party only for the purpose of determining which employers ought to receive notice of the application. That assertion is clearly wrong. If notice to employers potentially affected by the application was the only purpose for preparing the Preliminary Schedule "E", there would be no need for a responding party to accreditation applications to prepare both a Preliminary Schedule "E" and a Preliminary Schedule "F" as part of its response.

39. As noted by the Board in *National Capital Roadbuilders Association No. 2*, the Preliminary Schedule "E" actually serves two distinct purposes. One purpose is to facilitate notice to potentially affected employers. The second purpose is to serve as the union's pleadings with respect to the identity of the employers for whose employees it claims to hold relevant bargaining rights and which of those employers had such employees in their employ during the one year period immediately prior to the application date. It reflects the best information provided by the responding party union regarding those employers that fall within the group described in subsection 136(1)(a) of the Act. As noted above, the Board stated in *National Capital Roadbuilders Association No. 2* that the substance of the Preliminary Schedule "E" filed by the union is "generally accepted unless specifically challenged" by a party.

40. Accordingly, at the start of the hearing in this proceeding, the amended and revised Preliminary Schedule "E" list of 38 entities filed by the responding party identified the list of relevant employers for the purposes of section 136(1)(a) of the Act unless a party challenged one or more of the names on that list. The applicant states that it at no time during the hearing did it agree that the Preliminary Schedule "E" list asserted by the responding party should constitute the Final Schedule "E" list for the purposes of the count required by section 136 of the Act. That is, in fact, the case. However, at no time did the applicant assert that any of the employers named on the Preliminary Schedule "E" list ought to be deleted, except on the ground that 27 of those employers did not make Employer Filings to the Board. That is, the applicant does not challenge the inclusion of these 27 employers on the Final Schedule "E" list for the purpose of the count because they had no employees performing work for them in the bargaining unit within the 12 month period preceding the application date. It just states that because those 27 entities did not make an Employer Filing, they do not belong on the Final Schedule "E" list.

41. In this regard, no party suggests that the names of the 27 employers should be moved to the Schedule "F" list because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date. The parties to an accreditation proceeding are given the latitude to agree that the names of certain employers ought to be moved to the Schedule "F" list rather than remain on the Preliminary Schedule "E" list if the evidence reflects that they properly belong on Schedule "F". Here, counsel for the responding party stated in his written submissions that at the hearing he did not object to the transfer to Schedule "F" of any employer listed on the Preliminary Schedule "E" that had not made an Employer Filing with the Board.

42. In fact, during the course of the hearing I asked counsel for the responding party whether his client was asserting that the 27 entities that had not made Employer Filings ought to have been placed initially on Schedule "F" list rather than on the Schedule "E" list. Counsel said no. He indicated that, according to the records of the responding party, the 27 entities did, in fact, employ someone who performed work in the bargaining unit within the one year period immediately prior to the application filing date. That is, counsel acknowledged that, based on the materials in his client's possession, it maintained the position that the names of those 27 entities were properly on the Preliminary Schedule "E" list. However, counsel asserted that because none of those 27 employers had filed Employer Filings with the Board, the Preliminary Schedule "E" list ought to be finalized by deleting those 27 employers in any event, leaving the Final Schedule "E" list with only 11 names. Counsel advised that in any event his client was not in the position to adduce evidence regarding whether the 27 entities ought to properly remain on the Final Schedule "E" list, stating that the evidence in his client's possession was in the nature of hearsay evidence.

43. As noted above, both the applicant and the responding party rely upon Rule 23.4 and Rules 23.6 through 23.11 of the Board's Rules of Procedure in support of their approach. Each in particular relies upon Rule 23.10 of the Rules, which states that the Board will not consider oral evidence of representation or of objection or that employers no longer wish to be represented by an accredited employers' organization, except to identify or substantiate the evidence. Each states that it was precluded by these Rules from calling evidence to identify or to substantiate the inclusion of any particular employer identified on the Preliminary Schedule "E" list on the Final Schedule "E" list.

44. With respect to this latter argument, I disagree. Rule 23.4 clearly has no application to the issue in dispute, relating as it does to responses from employers' organizations, trade unions or a council of trade unions. It is also clear that Rule 23.10 does not have the effect asserted by the applicant and the responding party. Rule 23.10 does not preclude any party from calling evidence to establish the proper composition of the Final Schedule "E" list. It speaks only to hearing oral evidence of representation or objection, neither of which was in issue here. At the hearing of this proceeding, it was open to the parties to call evidence regarding the final composition of the Schedule "E" list.

45. Rule 23.6 undoubtedly requires an employer that receives notice of an application for accreditation to make an Employer Filing with the Board, including a Schedule "H" list of employees. The Rules also state that any employer who wishes to oppose the application must file a statement in writing with the Board not later than the employer response date. However, none of the Board's rules in any way acts to excuse the applicant from establishing the statutory prerequisites required to secure an accreditation certificate. Nor does the admonition contained in the notice of the application that warns employers that if they do not make an Employer Filing they may be deemed to have accepted all of the facts stated in the application, and that the Board may decide the application without further notice. What is at issue here has nothing to do with those employers leading evidence or making objections. What is at issue here is whether the statutory obligation reflected by subsection 136(2)(a) of the Act has been satisfied by the applicant.

46. In my view, the meaning of subsection 136(2) of the Act is clear upon a plain reading of its provisions. That subsection of the Act requires the applicant to establish, on the balance of probabilities, that it represents a majority of the employers in the unit of employers who have within the one year immediately preceding the application filing date had employees in their employ for whom the responding party has bargaining rights. The responding party has identified from its records 38 such employers. Based upon its records, the responding party states that those 38 employers fall within the bargaining unit. Based upon those same records, these 38 employers would remain on the Final Schedule "E" list had those employers filed an Employer Filing.

47. I am not prepared to move the 27 employers from the Preliminary Schedule "E" list to the Schedule "F" list for the sole reason that they have not filed Employer Filings with the Board. Nor am I prepared to just ignore them for the purposes of the count mandated by the Act. There is nothing in the Act (or, for that matter, in the Board's Rules) to suggest that employers who would otherwise be included on the Final Schedule "E" list but who do not file Employer Filings ought to be disregarded for the purposes of establishing the applicant's level of support for the purposes of subsection 136(2)(a) of the Act. In the absence of any evidence offered by the applicant at the

hearing that one or more of those 27 employers ought to be removed from the Preliminary Schedule "E", they will remain on the Final Schedule "E" determined by the Board.

48. The applicant has filed evidence of representation of 11 employers. The Final Schedule "E" list is composed of 38 employers. The applicant has not established, on balance, that it represents the "employer majority" for the purposes of subsection 136(2)(a) of the Act. Accordingly, this application is dismissed.

# COURT PROCEEDINGS

**3626-08-G (Court File No. 87/10)** International Brotherhood of Electrical Workers, Local 105 -and- Aecon Industrial, A Division of **Aecon Construction Group Inc.** and OLRB

**Construction Industry Grievance – Judicial Review – The union sought review of the Board's interpretation of the term "working conditions" in the collective agreement – The Board found that the employer's requirement that workers wear metatarsal safety boots were an enhanced safety policy and not an "exceptional" working condition – The Court held that the Board's contextual approach to its interpretation of the collective agreement was reasonable – Application dismissed**

Board decision not reported.

*Superior Court of Justice (Divisional Court), Ferrier, Molloy and Herman JJ.*, November 19, 2010

**MOLLOY J.** (ORALLY)

[1] This case involves the interpretation of a term of a Collective Agreement by a Labour Arbitrator. The parties agree that the standard of review is reasonableness.

[2] The Arbitrator interpreted a provision dealing with when the "employer" as opposed to the "employee" was required to provide protective clothing. The applicable provision of the Agreement states:

> 18.200 The Company accepts the responsibility to provide coveralls and all necessary protective clothing required for working conditions which are exceptional or would lead to speedier deterioration of personal clothing, than under normal or usually accepted working conditions.

[3] The employer in this case required all persons on the worksite to wear "metatarsal safety boots" which provide somewhat greater protection than the more widely used "green tag safety boots". Most employers in the industry do not require the metatarsal safety boots. The

Union argued that this is therefore an "exceptional" working condition and that the employer was obliged to supply the metatarsal boots.

[4] The Arbitrator accepted the employer's argument that there was nothing about the working conditions per se that was exceptional. This metatarsal boot requirement was simply an enhanced safety policy.

[5] In so finding, the Arbitrator was merely interpreting the words "working condition" as used within the context of this narrow provision. He was not thereby as suggested by the Union, rejecting longstanding jurisprudence that the term "working conditions" must be given a broad interpretation.

[6] There is some ambiguity in the language used in the agreement. The Arbitrator took a contextual approach to its interpretation. In *Dunsmuir v. New Brunswick* 2008 SCC 9 (CanLII), [2008], 1 S.C.R. 190 at para.47, the Supreme Court of Canada held that a decision is reasonable if it "falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law". The Arbitrator's decision in this case clearly falls within that spectrum. It is rational and supported by clearly articulated reasons. We see no basis to interfere.

**FERRIER J.**

[7] For oral reasons delivered this day, the application is dismissed. Costs payable by the Union to Aecon on consent, fixed at $5,000.00. No costs to the OLRB.

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**2904-09-U, 2905-09-FC, 3292-09-M (Court File No. 437/10)** Mark Corner -and- Ontario (Minister of Labour), International Union of Operating Engineers, Local 793, Rainbow Concrete Industries Limited and OLRB

**Judicial Review – Natural Justice – Stay – An employee brought an application to stay a Board decision directing the settlement by arbitration of a first contract between Rainbow and Operating Engineers – The employee had sought judicial review of the Board's (and the Minister's) respective first contract and final offer vote decisions on the basis that the Board and the Minister had violated his rights (and the rights of other employees) to procedural fairness and natural justice, since neither the Board nor the Minister gave the employees notice or an opportunity to participate in the proceedings – The court stated that the only effect of the arbitration proceeding on the applicant would be the imposition of a collective agreement and the applicant had conceded that it was unlikely that he will be adversely affected by the terms of such an agreement – Since the arbitration proceeding would not affect or exacerbate any harm done to the applicant as a result of the alleged denial of rights, the court found that the applicant had failed to establish irreparable harm – Motion dismissed**

Board decision not reported.

*Superior Court of Justice (Divisional Court), Herman J.*, December 1, 2010

[1] The applicant, Mark Corner, is an employee at Rainbow Concrete Industries Limited. He seeks a stay of the decision of the Ontario Labour Relations Board, dated February 3, 2010, or, alternatively, a stay of the first contract arbitration between Rainbow and the union, the International Union of Operating Engineers, Local 793, pending a determination of his application for judicial review. The arbitration is scheduled to commence on December 8, 2010.

[2] The applicant has sought judicial review of three decisions: the decision of the Board to order a first contract arbitration; the decision of the Minister of Labour on February 4, 2010 to cancel the final offer vote; and the referral of the Minister of Labour to the Board on February 5, 2010, for direction on the question of whether the Minister was required to direct that the final offer vote be held.

[3] The applicant claims that the Board and the Minister violated his rights and the rights of other employees to procedural fairness and natural justice, in that neither the Board nor the Minister gave the employees notice or an opportunity to participate in the proceedings.

[4] For the reasons that follow, I conclude that the applicant has not established irreparable harm. He therefore cannot succeed in the motion for a stay.

## Background

[5] The union filed an application for certification in April 2006. On March 30, 2009, it was certified as the exclusive bargaining agent for Rainbow's employees at its Sudbury location.

[6] On December 24, 2009, the union filed an application under s. 43 of the *Labour Relations Act 1995*, S.O. 1995, c. 1, Sched.A seeking access to first contract arbitration. It also filed an unfair labour practice complaint under s. 96 of the Act.

[7] The s. 96 and s. 43 applications were consolidated and were scheduled to be heard on January 26, 2010.

[8] On January 26, 2010, the Vice-Chair convened a hearing to deal with the s. 43 application. He did not deal with the s. 96 complaint.

[9] The applicant says that he and other employees learned about the hearing although they did not receive formal notice. He and 18 other employees appeared at the hearing. The Vice Chair advised them that he would not hear them because they were neither a party nor an intervenor. He told the employees that they could file an application to intervene if they wished.

[10] The employees left the hearing. They filed an application to intervene later that day but did not reappear at the hearing. The hearing concluded on the same day without the employees' participation.

[11] Also on January 25 or 26, 2010, Rainbow requested the Minister to order a final offer vote under s. 42 of the Act. The Minister did so and the vote was scheduled to take place on February 5, 2010.

[12] On February 3, 2010, the Board issued its decision on the s. 43 application. It ordered that the first contract be settled by way of arbitration. The Board found that the collective bargaining had not been successful and further discussions would not be fruitful. The Board further found that the lack of success occurred because the employer had refused to recognize the bargaining authority of the union, had adopted uncompromising bargaining positions without reasonable justification and had failed to make reasonable and expeditious efforts to conclude a collective agreement.

[13] The union advised the Minister of the Board's decision and asked him to cancel the final offer vote. The Minister did so on February 4, 2010. The applicant says that the employees did not receive notice of this decision nor were they given an opportunity to provide submissions.

[14] On February 5, 2010, the Minister referred to the Board for direction the question of whether he was required to direct that the final offer vote be held. The union and Rainbow made submissions on this matter. The applicant says that the employees received no notice nor did they have an opportunity to make submissions.

[15] The Board issued its decision on May 3, 2010, advising the Minister that he was not required to direct the final offer vote.

[16] Rainbow has filed two judicial review applications. These applications seek a review of the same decisions of the Board and the Minister that are the subject matter of the applicant's judicial review application. They will be heard at the same time as the applicant's judicial review application. No date has been set yet for the hearing of the applications.

[17] The first contract arbitration is scheduled to commence on December 8, 2010. The applicant seeks a stay of that arbitration, pending the Divisional Court's determination of the applications for judicial review.

## Positions of the Parties

[18] The parties agree that the test for obtaining a stay is the three-part test set out in *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311: (i) there must be a serious issue to be tried; (ii) the applicant will suffer irreparable harm if the motion is refused; and (iii) the balance of convenience favours granting the stay.

[19] The parties disagree as to whether the applicable first part of the test is a serious issue to be tried or a strong *prima facie* case. They also disagree as to what standard of review applies in the judicial review application.

[20] The applicant and the union disagree as to whether the applicant has established irreparable harm and where the balance of convenience lies.

### *The applicant*

[21] The applicant submits that because this is a test involving natural justice, he only needs to meet the test of a serious issue to be tried, not the higher standard of strong *prima facie* case

that generally applies in cases involving Board decisions. However, the applicant contends that he can, in any case, meet the higher standard.

[22] Furthermore, the applicant submits that in considering whether there is a serious issue or a strong *prima facie* case, I should determine that the standard of review that the reviewing court will apply is correctness. That is because the applicant's claim involves an alleged breach of natural justice and procedural fairness.

[23] The applicant maintains that proceeding with the arbitration prior to the court's decision on the judicial review applications will cause him irreparable harm. He submits that a denial of natural justice and procedural fairness constitutes irreparable harm and such harm will be exacerbated if the arbitration proceeds. In his submission, this harm far outweighs any inconvenience to the union of a delay of a few months.

*The employer*

[24] Rainbow supports the position of the applicant. It submits that there would be no prejudice to the union if a stay were granted, while the arbitration could become moot if the applicant or the employer is successful in the judicial review applications.

*The union*

[25] The union submits that a strong *prima facie* test applies to decisions of the Board and the Minister and the standard of review is reasonableness.

[26] The union further submits that the applicant has failed to establish any irreparable harm. However, a delay in the arbitration will add to the already significant delay that has occurred due to the employer's conduct.

*The Board*

[27] The Board's position is that the applicant must establish a strong *prima facie* test if he wants to obtain a stay of the Board's decision. However, given that the allegations involve a breach of natural justice, the Board submits that the issue is neither one of fact nor law. Therefore, the standards of review of correctness and reasonableness do not apply. Rather, in the Board's submission, the reviewing court's job is to determine whether there was a breach of natural justice or procedural fairness.

*The Minister*

[28] The position of the Minister is that the Minister's decisions with respect to the final offer vote are irrelevant to the decision of whether the arbitration should proceed since the Board's decision to direct a first contract arbitration was made before the Minister's decisions. However, if the court nonetheless considers the Ministers' decisions to be relevant, he submits that the appropriate standard of review is reasonableness.

Analysis

[29] In order to obtain a stay, the applicant must satisfy each of the three parts of the three-part test. For the reasons that follow, I have determined that the applicant has failed to establish irreparable harm and therefore cannot succeed in his application for a stay.

[30] It is therefore not necessary for me to determine whether the applicant has met the first stage of the test, whether that be a serious issue to be tried or a strong *prima facie* test. While it may be the case that where the applicant has a strong case on the merits, there will be less emphasis on the other two parts of the test, that does not mean that the applicant is relieved of establishing irreparable harm in order to obtain a stay (see Sharpe J.A., *Injunctions and Specific Performance* at pp. 2-13, 9-3 to 9-4).

[31] It is, in my opinion, preferable not to engage in a lengthy analysis of which standard of review is applicable and the merits of the case since the Divisional Court panel hearing the judicial review application will have to determine both of these issues.

[32] "Irreparable harm" refers to the nature of the harm, not to its magnitude. It is harm that cannot be quantified or harm that cannot be cured (*R.J.R. MacDonald Inc. v. Canada (Attorney General)* at para. 59).

[33] The applicant does not contend that his wages and benefits, terms and conditions of employment or seniority rights will be adversely affected should the arbitration proceed and a collective agreement be imposed.

[34] Rather, it is the applicant's submission that the Board's and the Minister's denial of natural justice and procedural harm is, in itself, irreparable harm. He contends that their decisions and actions resulted in the disenfranchisement of employees.

[35] The applicant submits that if the arbitration is allowed to proceed, the result will be that the employees will have a contract imposed on them by a third party until the Divisional Court undoes the wrong that has been done to them. This will exacerbate the irreparable harm that was caused by the Board and the Minister, even if the terms of the collective agreement do not adversely affect the applicant or other employees.

[36] However, the issue in this motion for a stay is not whether the alleged denial of natural justice by the Board and the Minister caused the applicant irreparable harm. Rather, in order to obtain a stay, the applicant must establish that he will suffer irreparable harm if the arbitration is allowed to proceed before the hearing of the judicial review applications.

[37] The issue of whether there was a denial or natural justice or procedural fairness will not be resolved until the Divisional Court determines the judicial review application. Any harm that the applicant claims has been done will not be undone until that decision is made.

[38] The only effect of the arbitration proceeding on the applicant will be the imposition of a collective agreement. The applicant concedes that it is unlikely that he will be adversely affected by the terms of such an agreement. I do not see how the arbitration proceeding will affect or

exacerbate any harm that was done to the employees as a result of the alleged denial of their rights by the Board and the Minister.

[39] I therefore conclude that the applicant has failed to establish that there will be irreparable harm should the arbitration proceed. Therefore, the motion for a stay cannot succeed.

[40] Given this conclusion, it is not necessary to consider the balance of convenience.

Conclusion

[41] The applicant has not established that irreparable harm will result if a stay is not granted. The motion for a stay is therefore dismissed.

[42] Neither the Board, the Minister nor Rainbow seeks costs.

[43] The union, as the successful party, is entitled to costs. It has presented a bill of costs of $6,340.00 in fees and $540.00 in disbursements. The union is claiming costs at a partial indemnity rate of $200.00 per hour. Counsel for the union is in-house counsel, with four years experience at the bar.

[44] The union I s not disentitled to its costs by reason of the matter having been handled by in-house counsel. On the other hand, a costs award should reflect the fact that there are generally lower overhead costs associated with in-house counsel. In the circumstances, a rate of $150.00 per hour would be appropriate. The number of hours claimed is reasonable.

[45] I note that the bill of costs submitted by counsel for the applicant is significantly higher ($14,398.50, inclusive) than that submitted by the union.

[46] In these circumstances, a costs award of $4,500, inclusive, is fair and reasonable. Costs are fixed at $4,500, inclusive, payable by the applicant to the union.

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**0784-05-G, 2836-08-G (Court File Nos. 437/09 and 92/10)** Ontario Sheet Metal Workers' and Roofers' Conference -and- Ellis-Don Limited, Ellis Don Corporation and OLRB and between International Brotherhood of Electrical Workers, Local 586 -and- Ellis Don Corporation and OLRB

**Construction Industry Grievance – Delay – Judicial Review – The Sheet Metal Workers and the IBEW sought judicial review of two Board decisions which found that a 1965 Working Agreement signed by Ellis Don did not confer bargaining rights on the unions and was not a recognition agreement – The IBEW also sought to challenge one of the Board decisions for delay – The Court found the Board's decision-making process in each case was transparent, intelligible and justifiable – On the issue of the two-year delay in issuing a decision, the Court held that the union failed to show any prejudice, and was unable to rebut the presumption of regularity of the Board's proceedings – Applications dismissed**

Board decision not reported.

*Superior Court of Justice (Divisional Court), Jennings, Sachs and Wilton-Siegell JJ.*, September 29, 2010

**WILTON-SIEGEL J.** (ORALLY)

[1] These two applications for judicial review are being heard together as they raise a common issue.

[2] The International Brotherhood of Electrical Workers, Local 586 (the "Electrical Workers") applies to this Court to set aside an arbitral decision of the Ontario Labour Relations Board (the "Board") dated August 5, 2009 pursuant to a construction industry grievance.

[3] The Ontario Sheet Metal Workers' and Roofers' Conference (the "Sheet Metal Workers") applies to set aside another arbitral decision of the Board dated December 2, 2009.

[4] In each case, the Board found that a Working Agreement dated February 16, 1965 between Ellis-Don Limited ("Ellis-Don") and Essex & Kent Counties Building and Construction Trades Council did not confer bargaining rights on the applicants.

[5] The parties are agreed that the standard of review is one of reasonableness as contemplated by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 291 D.L.R. (4th) 577. For the reasons set out in paragraph 31 of the Board's factum, we reject the Electrical Workers' submission that the comments made by Vice-Chair McKee in paragraph 6 of the decision dated August 5, 2009 in any way modify this standard.

[6] In each decision, the Board found that the two-paragraph Working Agreement was not a collective agreement. The applicants do not challenge this finding.

[7] The Board also found in each case that the Working Agreement cannot be said to create or reflect recognition rights in favour of the applicants, and as such, was not a recognition agreement.

[8] We are satisfied that this finding in each decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[9] We are also satisfied that the decision-making process used in each case was transparent, intelligible and justifiable.

[10] There is nothing in the Working Agreement that provides for any explicit recognition of, or the creation of, bargaining rights in favour of the applicants. In each case, the Board read the agreement as a whole and found the first paragraph to be of paramount importance. In each case, the Board also drew a distinction between an agreement to be bound by all the provisions and conditions of the respective collective agreements of the applicants attached to the Working Agreement covering all classifications of employees and an agreement to be bound to the respective collective agreements.

[11] The Board concluded that the proper way to read the words "bound by" is to read them as synonymous with "abide by". In each case, the Board found that Ellis-Don agreed to abide by the provisions and conditions of the collective agreement but did not agree to be bound to the collective agreement.

[12] There is ample support for this interpretation in the Working Agreement. If the intention of the parties had been to bind Ellis-Don to the collective agreements, it would not have been necessary to refer to "all the provisions and conditions covering all classifications of employees" in paragraph 1. If that had been the intention, all that would have been required was a statement that Ellis-Don agreed to be bound to the collective agreements.

[13] Further, if that had been intended, the parties would have expressed Ellis-Don's involvement as a binding obligation as if it had been a signatory to the collective agreements or had executed the collective agreements as a party thereto. While this language appears in paragraph 2, it was expressly omitted from paragraph 1.

[14] Lastly, paragraph 2 is restricted in its operation to changes and renewals of the provisions and conditions in the collective agreements. The inclusion of language by which Ellis-Don agrees to be bound by such changes or renewals "to the same extent as though [it] had executed such agreements" cannot be used to introduce bargaining rights as a result of subsequent developments when they were not granted at the time the Working Agreement was entered into.

[15] The applicants submit in the alternative, that the provisions of the collective agreements conferred bargaining rights and that by agreeing to be bound by those provisions, Ellis-Don indirectly conferred bargaining rights in favour of the applicants. Whether or not execution of the collective agreements would have conferred bargaining rights, which is disputed by Ellis-Don, the finding of the Board that the Working Agreement was limited in effect to binding Ellis-Don to provisions and conditions covering employees, rather than to a collective agreement, precludes such a finding.

[16] The Sheet Metal Workers also submitted that there had been a denial of natural justice because:

(i) The delay in delivering reasons of over two years resulted in unfairness which was aggravated by the Board's refusal to deal with an application to terminate the proceeding pursuant to s.115.1 of the *Labour Relations Act*; and

(ii) When the decision dated December 2, 2009 was delivered, it obviously simply echoed the analysis of the decision released on August 5, 2009 with no opportunity having been given to the Sheet Metal Workers to make submissions upon the August 5, 2009 decision.

[17] First, we observe that the Sheet Metal Workers took no steps to obtain relief under s.115.1 until the decision of August 5, 2009, which was unfavourable to the position of the Sheet Metal Workers, was released. No prejudice caused by the delay was demonstrated. Delay alone is not sufficient to establish prejudice, even in labour relations matters where delay is to be avoided. (See *Electrical Workers v. K2 Contracting Inc.*, [2003] O.J. No. 2688 (Div. Ct.)).

[18] Second, there is no evidence that the decision of December 2, 2009 was not arrived at as a result of an independent analysis based on the evidence and submissions to the arbitrator in that proceeding. The Sheet Metal Workers are unable to rebut the presumption of regularity of the Board's proceedings.

[19] Third, while the Sheet Metal Workers applied for relief under s.115.1 of the *Labour Relations Act*, they made no request to re-attend or otherwise make further submissions to the arbitrator regarding the significance of the August 5, 2009 decision.

[20] For these reasons, both applications are dismissed.

**JENNINGS J.**

[21] I have endorsed the back of the Record in Sheet Metal: "The application is dismissed for oral reasons delivered today. On consent, costs fixed at $5,000.00 payable by each of Sheet Metal Workers and Electrical Workers, for a total of $10,000.00, forthwith."

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 2010

## APPLICATIONS FOR CERTIFICATION

### Bargaining Agents Certified Without Vote

**1213-07-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Michael Monteith Enterprises Limited and Monteith Building Group Ltd. (Respondent) v. Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all construction labourers in the employ of Michael Monteith Enterprises Limited and Monteith Building Group Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Michael Monteith Enterprises Limited and Monteith Building Group Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office and in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

**1803-07-R:** Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Spacesaver Filing Systems Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Spacesaver Filing Systems Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Spacesaver Filing Systems Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

**1834-08-R:** Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Christina Homes Ltd. and 1357202 Ontario Ltd. o/a Christina West Joint Venture and, Westview Homes Ltd. (Respondent)

Unit: "all construction labourers in the employ of Christina Homes Ltd. and 1357202 Ontario Ltd. o/a Christina West Joint Venture and Westview Homes Ltd., in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except nonworking foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0782-09-R:** Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. Promark-Telecon Inc. (Respondent)

Unit: "all construction labourers in the employ of Promark-Telecon Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria; the Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland; the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton and Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

**2216-09-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 548493 Ontario Limited o/a Peter Fabbro Mason Contractor (Respondent)

Unit: "all construction labourers in the employ of 548493 Ontario Limited o/a Peter Fabbro Mason Contractor in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of 548493 Ontario Limited o/a Peter Fabbro Mason Contractor in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman" (2 employees in unit)

**2389-09-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Electro Instal Corporation (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Electro Instal Corporation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Electro Instal Corporation in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**1217-10-R:** International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Dynamic Electric and Fire Protection Inc. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Dynamic Electric and Fire Protection Inc in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Dynamic Electric and Fire Protection Inc in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

**1449-10-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. C & W Abreu General Construction Co. Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of C & W Abreu General Construction Co. Ltd. in all sectors of the construction industry in the Township of Machar and the adjacent Townships of Gurd, Strong, Laurier, Lount and Joly, excluding the industrial commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman all carpenters and carpenters' apprentices in the employ of C & W Abreu General Construction Co. Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**1603-10-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Consolidated Drilling and Blasting Inc. (Respondent)

Unit: "all construction labourers in the employ of Consolidated Drilling and Blasting Inc. in all sectors of the construction industry in the Townships of Nipissing, Patterson, Pringle, Lount, Machar, Laurier, Callandar, and the Municipality of Powassan, excluding those portions of the Townships of Nipissing, Patterson, Callandar and the Municipality of Powassan contained in OLRB Area 16, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**1965-10-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Stevensville Lawn Service Inc. (Respondent)

Unit: "all construction labourers, all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those engaged in the repairing and maintaining of same, and employees engaged as surveyors and all teamsters engaged in on-site construction in the employ of Stevensville Lawn Service Inc. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (32 employees in unit)

**1991-10-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Roni Excavating Limited and/or, 865217 Ontario Inc. o/a Iron Excavating and Grading and/or, Niro Bros. Excavating & Grading Inc. and/or, Iron Trio Inc. and/or, Orin Landscaping Inc. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Roni Excavating Limited and/or 865217 Ontario Inc. o/a Iron Excavating and Grading and/or Niro Bros. Excavating & Grading Inc. and/or Iron Trio Inc. and/or Orin Landscaping Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**2099-10-R:** Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Skypoint Hi-Rise Ltd. (Respondent)

Unit: "all construction labourers in the employ of Skypoint Hi-Rise Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

**2147-10-R:** The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Beaudoin Construction (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Beaudoin Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Beaudoin Construction in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**2148-10-R:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Canadian Ramp Company Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Canadian Ramp Company Inc. in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk; the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman all carpenters and carpenters' apprentices in the employ of Canadian Ramp Company Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**2197-10-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1272054 Ontario Limited c.o.b. as Brandon Contractors (Respondent)

Unit: "all construction labourers in the employ of 1272054 Ontario Limited c.o.b. as Brandon Contractors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman all construction labourers in the employ of 1272054 Ontario Limited c.o.b. as Brandon Contractors in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (41 employees in unit)

**2218-10-R:** Iron Workers District Council of Ontario (Applicant) v. 1476480 Ontario Inc. o/a Panic Construction Management (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of 1476480 Ontario Inc. o/a Panic Construction Management in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of 1476480 Ontario Inc. o/a Panic Construction Management in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**2243-10-R:** The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mazur Electrical & Mechanical Contracting Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Mazur Electrical & Mechanical Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and carpenters and carpenters' apprentices in the employ of Mazur Electrical & Mechanical Contracting Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (3 employees in unit)

## Bargaining Agents Certified Subsequent to Vote

**3986-09-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Eastview Development Limited, PML Traders Ltd., 667589 Ontario Ltd. o/a Northpoint Services (Respondent)

Unit: "all construction labourers in the employ of Eastview Development Limited, PML Traders Ltd., 667589 Ontario Ltd. o/a Northpoint Services in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Eastview Development Limited, PML Traders Ltd., 667589 Ontario Ltd. o/a Northpoint Services in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**1198-10-R:** UNITE HERE Local 75 (Applicant) v. ARAMARK Canada Limited (Respondent) v. Workers United Ontario Council (Intervener)

Unit: "all employees of ARAMARK Canada Limited, engaged in food services, employed at Schulich School of Business, Executive Learning Centre, at 4700 Keele Street, in the City of Toronto, Ontario, M3J 1P3 save and except supervisors, persons above the rank of supervisor, executive chef, office and clerical staff" (49 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 47 |
| Number of persons who cast ballots | 27 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 27 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 27 |
| Number of ballots marked in favour of intervener | 0 |
| Number of ballots segregated and not counted | 0 |

**1314-10-R:** Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Nithview Community, a division of Tri-County Mennonite Homes (Respondent)

Unit: "all employees of Nithview Community, a division of Tri-County Mennonite Homes, at 200 Boullee Street, in the Town of New Hamburg, Ontario, save and except Registered Nurses, Graduate Nurses, Office and Clerical Staff, Maintenance employees, pastoral care employees, volunteers, Supervisors and those above the rank of Supervisor" (130 employees in unit) *(Having regard to the agreement of the parties.) (Clarity Note)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 134 |
| Number of persons who cast ballots | 120 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 113 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 6 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 1 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 59 |
| Number of ballots marked against applicant | 54 |
| Number of ballots segregated and not counted | 7 |

**1636-10-R:** Canadian Office and Professional Employees Union Local 343 (Applicant) v. Joint Apprenticeship Council (Respondent)

Unit: "all employees of the Joint Apprenticeship Council in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except the Director, Instructors and the Assistant Director and those above the rank of Assistant Director" (10 employees in unit) *(Having regard to the agreement of the parties.)*

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|---|---|
| Number of names of persons on revised voters' list | 10 |
| Number of persons who cast ballots | 9 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 9 |

| | |
|---|---|
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 1 |
| Number of ballots marked in favour of applicant | 8 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**1689-10-R:** Elementary Teachers' Federation of Ontario (ETFO) (Applicant) v. Simcoe County District School Board (Respondent) v. Ontario Public Service Employees Union (Intervener)

Unit: "all designated Early Childhood Educators in the employ of Simcoe County District School Board, save and except supervisors and persons above the rank of supervisor" (18 employees in unit) *(Having regard to the agreement of the parties.)*

**1830-10-R:** Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newsmedia Guild (Applicant) v. Ming Pao Newspapers (Canada) Ltd. (Respondent)

Unit: "all employees of Ming Pao Newspapers (Canada) Ltd. in the city of Toronto save and except supervisors, persons above the rank of supervisor and persons employed in a confidential capacity in matters pertaining to labour relations." (144 employees in unit) *(Having regard to the agreement of the parties.) (Clarity Note)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 149 |
| Number of persons who cast ballots | 143 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 131 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 9 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 3 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 84 |
| Number of ballots marked against applicant | 47 |
| Number of ballots segregated and not counted | 10 |

**1921-10-R:** Canadian Union of Public Employees (Applicant) v. The Halton Catholic District School Board (Respondent)

Unit: "all employees of the Halton Catholic District School Board, in the region of Halton, employed as Designated Early Childhood Educators in the early learning program at Halton Catholic District School Board, save and except supervisors and persons above the rank of supervisor and those persons already represented by a trade union" (27 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 28 |
| Number of persons who cast ballots | 14 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 14 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 14 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**1955-10-R:** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Ventra Plastics - Windsor (Respondent)

Unit: "all employees of Ventra Plastics - Windsor in the Province of Ontario in the classifications of shipping and receiving, maintenance, molding processor, molding set-up, and tooling, save and except forepersons, persons above the rank of forepersons, office and sales staff and those persons covered under subsisting collective agreements" (37 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 37 |
| Number of persons who cast ballots | 35 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 35 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 31 |
| Number of ballots marked against applicant | 4 |
| Number of ballots segregated and not counted | 0 |

**1974-10-R:** Ontario Secondary School Teachers' Federation (OSSTF/FEESo) (Applicant) v. District School Board Ontario North East (Respondent)

Unit: "all employees who are employed as Early Childhood Educators by the District School Board Ontario North East, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 4 |
| Number of persons who cast ballots | 3 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 3 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 3 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**1980-10-R:** Elementary Teachers' Federation of Ontario (Applicant) v. Durham Catholic District School Board (Respondent)

Unit: "all employees employed as designated Early Childhood Educators (as defined by the Education Act) on a regular basis (not including occasional designated Early Childhood Educators) in the Early Learning Program at Durham Catholic District School Board as defined in the Education Act, save and except supervisors and persons above the rank of supervisor and those persons already represented by a trade union" (14 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 15 |
| Number of persons who cast ballots | 10 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 10 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |

| | |
|---|---|
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 10 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**1997-10-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. National Car Rental (Canada) Inc. (Respondent)

Unit: "all automotive technicians and maintenance technicians at National Car Rental (Canada) Inc. in the City of Toronto, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (12 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 12 |
| Number of persons listed as in dispute | 11 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 11 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 10 |
| Number of ballots marked against applicant | 1 |
| Number of ballots segregated and not counted | 0 |

**1998-10-R:** International Association of Machinists and Aerospace Workers (Applicant) v. Marquee Hotels Brampton Inc. o/a Fairfield Inn and Suites by Marriott (Respondent)

Unit: "all employees of Marquee Hotels Brampton Inc. o/a Fairfield Inn and Suites by Marriott, save and except supervisors, persons above the rank of supervisor, front desk, office, clerical, food and beverage, shuttle driver, maintenance, security, lifeguards and all other employees not employed in the housekeeping/laundry department" (11 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 21 |
| Number of persons who cast ballots | 17 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 11 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 6 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 8 |
| Number of ballots marked against applicant | 3 |
| Number of ballots segregated and not counted | 6 |

**2003-10-R:** Ontario Nurses' Association (Applicant) v. Gibson Holdings (Ontario) Ltd. o/a Helen Henderson Care Centre (Respondent)

Unit: "all Registered Nurses and Nurses with a Temporary Certificate of Registration engaged in a nursing capacity at Gibson Holdings (Ontario) Ltd. 0/a Helen Henderson Care Centre at Amherstview, Ontario, save and except Assistant Director of Care and those above the rank of Assistant Director of Care" (11 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 12 |
| Number of persons who cast ballots | 9 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 8 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 1 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 8 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 1 |

**2054-10-R:** Milk And Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 Affiliated with The International Brotherhood of Teamsters (Applicant) v. Invest Hotels GP IV Ltd. o/a Oshawa Comfort Inn (Respondent)

Unit: "all employees of Invest Hotels GP IV Ltd. o/a Oshawa Comfort Inn employed at 605 Bloor St. W. in the City of Oshawa, save and except Managers and those above the rank of Manager" (11 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 13 |
| Number of persons who cast ballots | 8 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 8 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 8 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2062-10-R:** Service Employees International Union Local 1 Canada (Applicant) v. Seasons Bell Lane Retirement Village (Respondent)

Unit: "all employees of Seasons Bell Lane Retirement Village, 55 Diana Avenue, Brantford, Ontario, save and except supervisors, persons above the rank of supervisor, and office and clerical" (30 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 31 |
| Number of persons who cast ballots | 27 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 27 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 15 |
| Number of ballots marked against applicant | 12 |
| Number of ballots segregated and not counted | 0 |

**2066-10-R:** The Retail, Wholesale and Department Store Union, District Council of the United Food and Commercial Workers International Union (Applicant) v. Waterfront Inn (Sault) Ltd. carrying on business as Sleep Inn (Respondent)

Unit: "all employees of the Waterfront Inn (Sault) Ltd. carrying on business as Sleep Inn, in the City of Sault Ste. Marie, Ontario, save and except General Manager, Manager and persons above the rank of General Manager, Managers" (14 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 15 |
| Number of persons who cast ballots | 13 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 13 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 11 |
| Number of ballots marked against applicant | 2 |
| Number of ballots segregated and not counted | 0 |

**2083-10-R:** Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent) v. Canadian Construction Workers' Union (Intervener)

Unit: "all employees of Hallmark Housekeeping Services Inc. engaged in janitorial cleaning in the City of Toronto, south of Highway 401, East of Highway 427 and West of the Don Valley Parkway, excluding employees working in the Rogers Centre, Rogers Campus, in buildings under 100,000 square feet of size and in building locations for which any other trade union currently has subsisting bargaining rights, save and except persons above the rank of working foreperson, office, clerical and sales staff" (209 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 268 |
| Number of persons who cast ballots | 129 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 117 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 12 |
| Number of spoiled ballots | 2 |
| Number of ballots marked in favour of applicant | 123 |
| Number of ballots marked in favour of intervener | 1 |
| Number of ballots segregated and not counted | 3 |

**2105-10-R:** Ontario Nurses' Association (Applicant) v. Victoria Order of Nurses Canada, Ontario Branch, North Bay site (Respondent)

Unit: "all Registered Practical Nurses and Registered Practical Nurses with a Temporary Certificate of Registration engaged in a nursing capacity at Victoria Order of Nurses Canada, Ontario Branch, North Bay site, save and except managers and those above the rank of manager" (10 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 9 |
| Number of persons who cast ballots | 7 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 7 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 7 |

| | |
|---|---|
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2121-10-R:** Ontario Public Service Employees Union (Applicant) v. Kingston Military Family Resource Centre Inc. (Respondent)

Unit: "all persons employed by the Kingston Military Family Resource Centre Inc. in the City of Kingston, Ontario, save and except Managers and persons above the rank of Manager, Executive Assistant and Executive Director, all persons who exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3) (b) of the Ontario Labour Relations Act, 1995, all persons for whom a trade union held bargaining rights on September 30, 2010" (22 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 38 |
| Number of persons who cast ballots | 17 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 13 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 4 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 12 |
| Number of ballots marked against applicant | 1 |
| Number of ballots segregated and not counted | 4 |

**2137-10-R:** Labourers' International Union of North America, Local 625 (Applicant) v. Winroc, a Division of Superior Plus LP (Respondent)

Unit: "all employees of Winroc, a Division of Superior Plus LP working in and out of the City of Windsor, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (6 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 7 |
| Number of persons who cast ballots | 7 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 7 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 4 |
| Number of ballots marked against applicant | 3 |

**2141-10-R:** Workers United Ontario Council (Applicant) v. Ranpro Inc. (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees at Ranpro Inc.'s plant in Simcoe, Ontario save and except managers, supervisors, electronic pattern and marker maker, designer, lab technician, office, clerical and sales staff, persons employed regularly for not more than twenty-four (24) hours per week and students employed during the summer vacation period" (40 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 40 |
| Number of persons who cast ballots | 27 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 27 |

| | |
|---|---|
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 1 |
| Number of ballots marked in favour of applicant | 23 |
| Number of ballots marked against applicant | 3 |

**2144-10-R**: Workers United Ontario Council (Applicant) v. Niagara Parks Commission (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of the Niagara Parks Commission employed as servers in the City of Niagara Falls, save and except Supervisors, persons above the rank of Supervisor and employees for which any trade union held bargaining rights as of July 5, 1994" (83 employees in unit) (Having regard to the agreement of the parties.)

| | |
|---|---|
| Number of names of persons on revised voters' list | 93 |
| Number of persons who cast ballots | 41 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 41 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 40 |
| Number of ballots marked against applicant | 1 |
| Number of ballots segregated and not counted | 0 |

**2150-10-R:** Southwestern Ontario Health Care and Service Workers, Local 303, affiliated with the Christian Labour Association of Canada (Applicant) v. 2198060 Ontario Inc. c.o.b. as SerenityChatham and Chatham Serenity Assisted Living (Respondent)

Unit: "all employees of 2198060 Ontario Inc. c.o.b. as Serenity-Chatham and Chatham Serenity Assisted Living employed in the City of Chatham, save and except registered nurses, supervisors, persons above the rank of supervisor, and office staff" (9 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 9 |
| Number of persons who cast ballots | 9 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 9 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 6 |
| Number of ballots marked against applicant | 3 |

**2155-10-R:** Workers United Ontario Council (Applicant) v. Sodexo Canada Ltd. (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Sodexo Canada Ltd. employed in the Province of Ontario working at nursing homes, long term care facilities, hospitals, and any other similar health care facilities save and except supervisors, persons above the rank of supervisors, chefs, clerical and administrative staff, guards, employees working at St. Hilda's, Providence Motherhouse, Sheppard Village Retail, and any employee already covered by a collective agreement or for whom a union already holds bargaining rights" (22 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 21 |
| Number of persons who cast ballots | 10 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 10 |
| Number of segregated ballots cast by persons whose names appear on voter's list | |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 9 |
| Number of ballots marked against applicant | 1 |

**2160-10-R:** Workers United Ontario Council (Applicant) v. Robert Soper Limited (Respondent) v. UNITE HERE (Intervener)

Unit: "all Robert Soper Limited's employees in Hamilton, with the exception of Supervisory, Management, Office and Sales staff; working crew leader; persons regularly employed for less than twenty-four (24) hours per week, and seasonal employees between May 1 and the first Monday in September" (8 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 8 |
| Number of persons who cast ballots | 7 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 7 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 7 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2164-10-R:** Workers United Ontario Council (Applicant) v. Aramark Canada Ltd. ("Aramark") (Respondent) v. UNITE HERE (Intervener)

Unit: "all Aramark Canada Ltd. employees engaged in food service employed at Central West Specialized Developmental Services (formerly Oaklands Regional Centre), Oakville, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the summer months" (2 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 2 |
| Number of persons who cast ballots | 2 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 2 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 2 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2195-10-R:** Labourers' International Union of North America, Local 247 (Applicant) v. Eco Living Cleaners Inc. (Respondent)

Unit: "all employees of Eco Living Cleaners Inc. at the Kingston Police Headquarters Building, 705 Division Street, Kingston, Ontario, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 7 |
| Number of persons who cast ballots | 6 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 5 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 1 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 5 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 1 |

**2202-10-R**: Canadian National Federation of Independent Unions (Applicant) v. Arbour Heights (Respondent)

Unit; "all employees of 2109577 Ontario Limited o/a Arbour Heights in the City of Kingston, save and except supervisors, persons above the rank of supervisor, co-ordinators, registered and graduate nurses, managers, maintenance, office and clerical staff and students hired for summer employment" (15 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 13 |
| Number of persons who cast ballots | 15 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 15 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 15 |

## Applications for Certification Dismissed Without Vote

**2080-09-R:** Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. P. A. Catch Basin Cleaning Services Inc. (Respondent)

## Applications for Certification Dismissed Subsequent to Vote

**0863-08-R:** The Canadian Union of Public Employees (Applicant) v. The Palm Foundation operating as Oakham House (Respondent) v. Ontario Public Service Employees Union (Intervener)

Unit: "all employees of The Palm Foundation operating as Oakham House in the City of Toronto, save and except supervisors and persons above the rank of supervisor and employees already represented by a trade union" (0 employees in unit)

**1458-08-R:** Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jensen Building Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the responding party in all other sectors of the construction industry in the Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of

Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, save and except non-working foremen and persons above the rank of non- working foreman" (2 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 4 |
| Number of persons who cast ballots | 2 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 2 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 0 |
| Number of ballots marked against applicant | 2 |

**0754-09-R; 0765-09-R:** The Underground Locators Association (Applicant) v. Promark-Telecon Inc. (Respondent) v. Universal Workers Union, Labourers International Union of North America Local 183 (Intervener); Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Promark-Telecon Inc. (Respondent)

Unit: "All employees of Promark Telecon Inc. in the Region of Durham, City of Kawartha Lakes, Peterborough County and Northumberland County, save and except non-working foremen, persons above the rank of non-working foreman, office and clerical staff" (27 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 27 |
| Number of persons who cast ballots | 26 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 18 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 7 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 1 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 8 |
| Number of ballots marked in favour of intervener | 10 |
| Number of ballots segregated and not counted | 8 |

**1817-10-R:** International Association of Machinists and Aerospace Workers (Applicant) v. St. Andrews Terrace Long Term Care Community (Respondent)

Unit: "all employees of St. Andrew's Terrace Long Term Care Community in the City of Cambridge, save and except Registered Nurses, Life Enrichment, office and clerical staff, supervisors and persons above the rank of supervisor." (146 employees in unit)

**1979-10-R:** United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Richelieu Hardware Ltd. (Respondent)

Unit: "all employees of Richelieu Hardware Ltd., in the City of Kitchener, save and except supervisors, and those above the rank of supervisor, office and clerical staff." (37 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 39 |
| Number of persons who cast ballots | 37 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 36 |

| | |
|---|---|
| Number of segregated ballots cast by persons whose names appear on voter's list | 1 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 16 |
| Number of ballots marked against applicant | 20 |
| Number of ballots segregated and not counted | 1 |

**2018-10-R:** United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Clemmer Steelcraft Technologies Inc. (Respondent)

Unit: "all employees of Clemmer Steelcraft Technologies Inc. in the City of Cambridge save and except supervisors and those above the rank of supervisor, office, clerical, technical staff" (105 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 114 |
| Number of persons who cast ballots | 112 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 108 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 3 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 1 |
| Number of spoiled ballots | 1 |
| Number of ballots marked in favour of applicant | 46 |
| Number of ballots marked against applicant | 61 |
| Number of ballots segregated and not counted | 4 |

**2047-10-R:** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Angus Consulting Management Limited (Respondent)

Unit: "all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff" (8 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 15 |
| Number of persons who cast ballots | 10 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 8 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 2 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 4 |
| Number of ballots marked against applicant | 4 |
| Number of ballots segregated and not counted | 2 |

**2133-10-R:** International Association of Machinists and Aerospace Workers (Applicant) v. Penninsula Video & Sound o/a PVS Contractors (Respondent)

Unit: "all employees of the responding party save and except supervisors, persons above the rank of supervisor, sales and clerical staff." (5631 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 56 |
| Number of persons who cast ballots | 51 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 51 |

| | |
|---|---|
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 16 |
| Number of ballots marked against applicant | 35 |

**2169-10-R:** Workers United Ontario Council (Applicant) v. Holiday Inn Downtown Windsor (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of the Company located at 430 Ouellette Avenue, Windsor, Ontario, save and except Assistant Housekeepers, Supervisors, Office and Sales Staff (Accounting staff, Secretaries and Security staff)" (31 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 22 |
| Number of persons who cast ballots | 19 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 19 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 6 |
| Number of ballots marked against applicant | 13 |
| Number of ballots segregated and not counted | 0 |

**2193-10-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 affiliated with the International Brotherhood of Teamsters (Applicant) v. Pestell Minerals & Ingredients Inc. (Respondent)

Unit: "all employees of Pestell Minerals & Ingredients Inc. in New Hamburg, Ontario and Baden, Ontario, save and except Managers and persons above the rank of Manager, quality assurance, purchasing, clerical, office and sales employees." (28 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 33 |
| Number of persons who cast ballots | 32 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 29 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 3 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 9 |
| Number of ballots marked against applicant | 20 |
| Number of ballots segregated and not counted | 3 |

## Applications for Certification Withdrawn

**2564-09-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Varcon Construction Co. Ltd., Varcon Construction Corporation (Respondent)

**3032-09-R:** Canadian Union of Public Employees (Applicant) v. Toronto Transit Commission (Respondent)

**1966-10-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Stevensville Lawn Service Inc. (Respondent)

**2020-10-R:** Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Direct Line Environmental Corp. (Respondent)

**2100-10-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 affiliated with the International Brotherhood of Teamsters (Applicant) v. Pestell Pet Foods (Respondent)

**2102-10-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 affiliated with the International Brotherhood of Teamsters (Applicant) v. Pestell Minerals & Ingredients Inc. (Respondent)

**2236-10-R:** UFCW Canada, Local 333 (Applicant) v. Royal Victoria Hospital (Respondent)

**2263-10-R:** Canadian Union of Public Employees (Applicant) v. Waste Services Inc / BFI Canada Inc. (Respondent)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**3377-07-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Monteith-McGrath Limited, Michael Monteith Enterprises Limited, and Monteith Building Group Ltd. (Respondent) *(Dismissed)*

**0745-09-R:** Universal Workers Union, LIUNA, Local 183 (Applicant) v. Telecon Canada Ltd., Promark-Telecon Inc. (Respondent) v. The Underground Locators Association (Intervener) *(Terminated)*

**2740-09-R:** Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America on its own behalf and on behalf of its Affiliated Local Unions 1007, 1151, 1244, 1410, 1425, 1592, 1916 and 2309 (Applicant) v. Girotti St. Catharines Ltd. c.o.b. Girotti Machine and, 1448084 Ontario Ltd. c.o.b. Excel Machine Repair (Respondent) *(Endorsed Settlement)*

**1870-10-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. JNF Concrete Ltd. and, JNF Ready Mix Inc. (Respondent) v. Christian Labour Association of Canada (Intervener) *(Granted)*

## SALE OF A BUSINESS

**3377-07-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Monteith-McGrath Limited, Michael Monteith Enterprises Limited, and Monteith Building Group Ltd. (Respondent) *(Dismissed)*

**0745-09-R:** Universal Workers Union, LIUNA, Local 183 (Applicant) v. Telecon Canada Ltd., Promark-Telecon Inc. (Respondent) v. The Underground Locators Association (Intervener) *(Terminated)*

**2740-09-R:** Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America on its own behalf and on behalf of its Affiliated Local Unions 1007, 1151, 1244, 1410, 1425, 1592, 1916 and 2309 (Applicant) v. Girotti St. Catharines Ltd. c.o.b. Girotti Machine and, 1448084 Ontario Ltd. c.o.b. Excel Machine Repair (Respondent) *(Endorsed Settlement)*

**0547-10-R:** Canadian Union of Public Employees and its Local 3585 (Applicant) v. Infrastructure Health and Safety Association ("IHSA"), Power Workers' Union, C.U.P.E. Local 1000, C.L.C. (Respondent) *(Granted)*

**1407-10-R:** Carpenters' Dictrict Council of Ontario, Local 2486 (Applicant) v. Venture North Construction Limited; and, Hori10n Building Group Ltd. (Respondent) *(Endorsed Settlement)*

**1870-10-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. JNF Concrete Ltd. and, JNF Ready Mix Inc. (Respondent) v. Christian Labour Association of Canada (Intervener) *(Granted)*

**1944-10-R:** BFI Canada Inc. (Applicant) v. Teamsters Local Union No. 879 and, Labourers' International Union of North America, Local 837 (Respondent) *(Granted)*

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1990-10-R:** Harpreet S Kalsi (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent) *(Granted)*

Unit: "all employees of Dyaltech Inc. in the Region of Peel, save and except supervisors, persons above the rank of supervisor, office and sales staff." (6 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 4 |
| Number of persons who cast ballots | 5 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 4 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 1 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of respondent | i |
| Number of ballots marked against respondent | 3 |
| Number of ballots segregated and not counted | 1 |

**2188-10-R:** AIDS Niagara Employees (Sandra Koster) (Applicant) v. CUPE 1263 (Respondent) *(Dismissed)*

**2324-10-R:** Carol Brabant (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 598 (Respondent) v. The Elizabeth Centre (formerly Valley East Long Term Care Centre) (Intervener) *(Dismissed)*

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1250-07-U:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Michael Monteith Enterprises Limited/Monteith Building Group Ltd. (Respondent) v. Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Intervener) *(Granted)*

**2473-08-U:** Dean Warren (Applicant) v. National Hockey League (Respondent) *(Dismissed)*

**2669-08-U; 2835-08-U:** Essex and Kent Counties Skilled Trades Council (Applicant) v. Greater Essex County District School Board (Respondent); Greater Essex County District School Board (Applicant) v. Essex and Kent Counties Skilled Trades Council (Respondent) *(Dismissed)*

**0883-09-U:** Frank Guan10n (Applicant) v. Teamsters Local Union No. 230 (Respondent) v. Dufferin Concrete, a division of Holcim (Canada) Inc. (Intervener) *(Withdrawn)*

**1545-09-U:** Health Care and Service Workers Union, Local 304 affiliated with the Christian Labour Association of Canada (Applicant) v. Chartwell Senior Housing REIT carrying on business as Chartwell Classic Oakville (Respondent) *(Terminated)*

**2467-09-U:** Ron Annabelle, Shaun Magee (Applicant) v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of The United States, its Territories and Canada Local 873 and Bob Hall and Don Carmody (Respondent) *(Terminated)*

**2592-09-U:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Varcon Construction Co. Ltd., Varcon Construction Corporation (Respondent) *(Withdrawn)*

**2924-09-U:** Darrell Joseph Boehm (Applicant) v. Power Workers' Union, CUPE Local 1000 (Respondent) v. Kitchener Wilmot Hydro Inc. (Intervener) *(Dismissed)*

**3306-09-U:** Sid Bradley (Applicant) v. CAW Local 4451 & it's National Union (Respondent) v. Cooper Standard Automotive (Intervener) *(Withdrawn)*

**3342-09-U:** Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Lake Dalrymple Contracting Ltd. and/or 302422 Ontario Ltd. (Respondent) *(Withdrawn)*

**3370-09-U:** Miraslaw Bandrowski (Applicant) v. UNITE HERE, Local 272 (Respondent) v. Ottawa Catholic School Board (Intervener) *(Withdrawn)*

**3478-09-U:** Maysadis V. Meikle (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 1256 and 2009 (Respondent) v. Mississauga Seating Systems, a division of Magna Seating Systems Inc. (Intervener) *(Dismissed)*

**3547-09-U:** Tom Petingola, Toby Traveson, Marko Pelli, Kerry Symbolull, Aaron Welter, Jamie Morrow, Roy Lang, Theresa Dawyd, Teresa Particelli, Elizabeth Belsito, Michelle Nickle, Nigel Milne, Diane Bock, Angela Johnston, Lone Cicino, Brenda Pregent, Diane Deschene, Doris Barbarie, Mike Capisciolto, Larry Ricard, Lori Lever, Tern Lynn Parent, James Larocque, Mike Beharriell, David Churchill, Abe Sawatzky, John Guido, Judy Hooton, Melanie Soullieve, Kathy O'Donnell, Art Holmes, Paula Forget and Nancy Ferland (Applicant) v. United Food & Commercial Workers Union, Local 1000A (Respondent) *(Dismissed)*

**3619-09-U:** Jackie Haines (Applicant) v. Canadian Union of Public Employees, Local 2290 (Respondent) v. The Corporation of the County of Frontenac (Fairmount Home for the Aged) (Intervener) *(Dismissed)*

**0115-10-U:** Thomas Park (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 385 (Respondent) v. Coca-Cola Bottling Company (Intervener) *(Dismissed)*

**0448-10-U:** Canadian Union of Public Employees, Local 79 (Applicant) v. Toronto Community Housing Corporation (Respondent) *(Withdrawn)*

**0489-10-U:** Rusty Barron (Applicant) v. Canadian Union of Public Employees Local No. 1734 (Respondent) v. York Region District School Board (Intervener) *(Dismissed)*

**0816-10-U; 0817-10-U:** Dr. Peter A. Khaiter (Applicant) v. York University Faculty Association (YUFA) (Respondent) *(Dismissed)*

**0989-10-U:** Public Service Alliance of Canada (Applicant) v. Canadian Corps of Commissionaires (Kingston and Region Division) (Respondent) *(Withdrawn)*

**1136-10-U:** Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. WJC Property Maintenance (Respondent) *(Withdrawn)*
**1348-10-U:** Ontario Public Service Employees Union (Applicant) v. Guelph Independent Living (Respondent) *(Withdrawn)*

**1426-10-U:** Canadian Union of Public Employees and its Local 4987 (Applicant) v. Bough Beeches Place (Respondent) *(Withdrawn)*

**1639-10-U:** Canadian Union of Public Employees and its Local 1281 (Applicant) v. Graduate Student Association (Lounge) (Respondent) *(Terminated)*

**1702-10-U:** Teamsters Local Union No. 230 affiliated with the International Union of Teamsters (Applicant) v. B. Gottardo Construction Ltd. (Respondent) *(Granted)*

**1780-10-U:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Guylene Sales and Enterprises Ltd. (Respondent) *(Granted)*

**1809-10-U:** Allan Shirra (Applicant) v. Workers United Ontario Council (Respondent) *(Withdrawn)*

**1911-10-U:** United Food and Commercial Workers Canada, Local 175 (Applicant) v. National Car Rental (Canada) Inc. (Respondent) *(Withdrawn)*

**1967-10-U:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Stevensville Lawn Service Inc. and Terry Tykolis (Respondent) *(Withdrawn)*

**2035-10-U:** International Union of Painters and Allied Trades, Local 1904 (Applicant) v. Mobile Glass & Framing Inc. (Respondent) *(Withdrawn)*

**2072-10-U:** Ontario Public Service Employees Union (Applicant) v. Trent University (Respondent) *(Withdrawn)*

**2111-10-U:** Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Direct Line Environmental Corp. (Respondent) *(Withdrawn)*

**2132-10-U:** Baozhu Cui (Applicant) v. United Food & Commercial Workers Canada, Local 175 (Respondent) v. The Minute Maid Company Canada Inc. (Intervener) *(Withdrawn)*

**2200-10-U:** United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Triple N Metal LP (Respondent) *(Withdrawn)*

**2247-10-U:** Labourers' International Union of North America, Local 247 (Applicant) v. Eco Living Cleaners Inc. (Respondent) *(Withdrawn)*

**2256-10-U:** Teamsters Local Union No. 879 (Applicant) v. BFI Canada Inc. (Respondent) *(Withdrawn)*

## APPLICATION FOR INTERIM ORDER

**2198-10-M:** United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Triple M Metal LP (Respondent) *(Withdrawn)*

**2248-10-M:** Labourers' International Union of North America, Local 247 (Applicant) v. Eco Living Cleaners Inc. (Respondent) *(Withdrawn)*

**2257-10-M:** Teamsters Local Union No. 879 (Applicant) v. BFI Canada *(Withdrawn)*

**2289-10-M:** Universal Workers Union, Labourers' International Union of North America, Local 183 on its own behalf and on behalf of its Members and Executive Board (Applicant) v. Labourers International Union of North America, Joseph S. Mancinelli, Ronald Manella, A. Pink, Q.C., and, Cosmo (Respondent) v. Jack Oliveira and Luis Camara (Intervener) Inc. (Respondent) *(Terminated)*

## JURISDICTIONAL DISPUTES

**2154-08-JD; 2757-08-JD; 2758-08-JD; 2759-08-JD:** Carpenters' District Council of Ontario (Applicant) v. Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Canada Ltd. and, Elite Building Group Inc. (Respondent); International Association of 736; PCL Constructors Canada Ltd. and Elite Building Group Inc.

(Respondent); Labourers' International Union of North America, Local 837 (Applicant) v. PCL Constructors Canada Inc. and, Carpenters District Council of Ontario (Respondent) v. Elite Building Group Inc. (Intervener); Universal Workers' Union, Labourers' International Union of North America, Local 183 and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. PCL Constructors Canada Inc. and, Carpenters District Council of Ontario (Respondent) v. Elite Building Group Inc. (Intervener); Labourers' International Union of North America, Local 506 and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. PCL Constructors Canada Inc. and, Carpenters District Council of Ontario (Respondent) v. Elite Building Group Inc. (Intervener) *(Granted)*

**3633-08-JD:** Brick and Allied Craft Union of Canada, Local 1 (Applicant) v. U.S. Steel Canada Inc. - Lake Erie Works and, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 8782 (Respondent) v. Masonry Industry Employers' Council of Ontario (Intervener) *(Withdrawn)*

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**3685-09-OH:** Saleem Karamali (Applicant) v. Par-Pak Ltd. (Respondent) *(Withdrawn)*

**0698-10-OH:** Jaime Simbana (Applicant) v. Clover Tool Manufacturing Limited (Respondent) *(Withdrawn)*

**1108-10-OH:** Ila Beaudoin (Applicant) v. Koprash Inc./Sunlite Floor Cleaners (Respondent) *(Withdrawn)*

**1452-10-OH:** Lisa Florence Angus (Applicant) v. CML Healthcare Inc (Respondent) *(Withdrawn)*

**1544-10-OH:** Wayne Calberry (Applicant) v. CLV Group, Interrent Holdings Limited Partnership ("Interrent") (Respondent) *(Withdrawn)*

**1599-10-OH:** Liliana Martinez (Applicant) v. Amanda D'Souza Pharmacy Inc. (Respondent) *(Withdrawn)*

## CONSTRUCTION INDUSTRY GRIEVANCES

**0069-07-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Black & McDonald Limited (Respondent) v. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, International Brotherhood of Electrical Workers Construction Council of Ontario (Intervener) *(Dismissed)*

**2497-09-G:** International Union of Operating Engineers, Local 793 (Applicant) v. The Atlas Corporation and/or Atlas Dewatering Limited and/or Atlas Constructors Inc. (Respondent) *(Withdrawn)*

**2914-09-G:** Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America on its own behalf and on behalf of Allied Construction Employees Local 1030 (Applicant) v. Queensgate Homes Inc. (Respondent) *(Withdrawn)*

**0996-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Westview Electric Contractors Inc. (Respondent) *(Withdrawn)*
**1661-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Spider Electrical Inc. (Respondent) *(Endorsed Settlement)*

**1781-10-G; 1792-10-G:** Carpenters & Allied Workers, Local 1256, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bernie Klaus Duewel c.o.b. as BKD Interiors (Respondent); Carpenters & Allied Workers, Local 1256, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bernie Klaus Duewel c.o.b. as BKD Interiors (Respondent) *(Endorsed Settlement)*

**1783-10-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Prim Renovations Inc. and, Omaira Parra (Respondent) *(Granted)*

**1832-10-G:** International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Black & McDonald Limited (Respondent) *(Terminated)*

**1844-10-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Via Trim & Doors Inc. (Respondent) *(Endorsed Settlement)*

**1925-10-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Hydro One Inc. (Respondent) *(Endorsed Settlement)*

**1957-10-G:** Carpenters District Council of Ontario, Local Union 93 (Applicant) v. Kenny Racine c.o.b. as M K Door & Finishing (Respondent) *(Endorsed Settlement)*

**1971-10-G:** Construction and Allied Workers Local Union 607 (Applicant) v. Man-Shield (NWO) Construction Inc. (Respondent) *(Endorsed Settlement)*

**1983-10-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Ingerwood Construction Ltd. (Respondent) *(Endorsed Settlement)*

**1984-10-G:** International Brotherhood of Electrical Workers, Local 303 (Applicant) v. E.S. Fox Ltd. (Respondent) *(Withdrawn)*

**1986-10-G:** Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mario Genua and Lino Genua c.o.b. as Gen's Drywall Lathing & Acoustics (Respondent) *(Granted)*

**2019-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Regal Electricians Inc. (Respondent) *(Endorsed Settlement)*

**2022-10-G:** Sheet Metal Workers' International Association, Local 473 (Applicant) v. Bruce Power LP (Respondent) v. Electrical Power Systems Construction Association (Intervener) *(Terminated)*

**2024-10-G:** International Union of Operating Engineers, Local 793 (Applicant) v. PCN Construction Group Inc. (Respondent) *(Granted)*

**2025-10-G:** The International Union of Painters and Allied Trades, Local Union 1904 (Applicant) v. Arco Coatings (2003) Ltd. (Respondent) *(Granted)*

**2029-10-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Aecon Utilities (Respondent) *(Withdrawn)*

**2034-10-G:** International Union of Painters and Allied Trades, Local 1904 (Applicant) v. Mobile Glass & Framing Inc. (Respondent) *(Withdrawn)*

**2041-10-G:** The Carpenters' District Council of Ontario, Local Union 93 (Applicant) v. Presto Construction Inc. (Respondent) *(Endorsed Settlement)*

**2046-10-G:** Labourers' International Union of North America, Local 247 (Applicant) v. Lions Demolition (Respondent) *(Terminated)*

**2056-10-G:** Sheet Metal Workers' International Association Local 30 (Applicant) v. Casal Metal Ltd. (Respondent) *(Granted)*

**2065-10-G:** Construction and Allied Workers Local Union 607 (Applicant) v. Swan & Associates Ltd. (Respondent) *(Withdrawn)*

**2069-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 683717 Ontario Limited (Respondent) *(Endorsed Settlement)*

**2087-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Victor Electrical Contractors Limited (Respondent) *(Withdrawn)*

**2093-10-G:** Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Brent Robert O'Quinn c.o.b. as Brecon Construction (Respondent) *(Granted)*

**2101-10-G:** Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gala Store Fixtures Installations Inc. (Respondent) *(Granted)*

**2103-10-G:** The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1710488 Ontario Ltd. o/a Ararat Eifs Wall Systems (Respondent) *(Granted)*

**2166-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. EMCS Controls Inc. (Respondent) *(Withdrawn)*

**2175-10-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Biggs & Narciso Construction Services Inc. (Respondent) *(Terminated)*

**2201-10-G:** International Brotherhood of Electrical Workers, Local 105 (Applicant) v. B & J Electric (2003) Inc. (Respondent) *(Endorsed Settlement)*

**2208-10-G:** Carpenters District Council of Ontario, Local 93 (Applicant) v. Herve Pomerleau Inc. (Respondent) *(Withdrawn)*

**2258-10-G:** The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Gen's Drywall Lathing & Acoustics Inc. (Respondent) *(Granted)*

**2286-10-G:** The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Golden Rock Painting Ltd. (Respondent) *(Granted)*

## APPEAL . EMPLOYMENT PROTECTION FOR FOREIGN NATIONALS ACT

**0734-10-EF:** Antonietta Bruni (Applicant) v. Eva Roselada and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

## APPEALS - EMPLOYMENT STANDARDS ACT

**1118-08-ES:** United Steelworkers of America, Local 9211 (Applicant) v. Lindsay Electronics Inc., Lindsay Broadband Inc. (Respondent) *(Withdrawn)*

**1242-08-ES; 1243-08-ES** Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Robert Shewell and Director of Employment Standards (Respondent); Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) Steven Wolfreys and Director of Employment Standards (Respondent) *(Granted)*

**0784-09-ES:** Jody Wells (Applicant) v. 1395153 Ontario Ltd. o/a Top Hat Home Comfort Services and, Director of Employment Standards (Respondent) *(Granted)*

**2326-09-ES:** Gerrard Trueman Tuck, Director of 2024972 Ontario Inc. o/a Tuck's Professional Services (Applicant) v. Estate of Bonnie McKeown and, Director of Employment Standards (Respondent) v. Attorney General of Ontario (Intervener) *(Dismissed)*

**2563-09-ES:** Emergency Plumbing Limited. (Applicant) v. Jonathan Gresseux and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2659-09-ES:** Angela Hambrook (Applicant) v. Omnicom Canada Inc. o/a DDB Canada, Director of Employment Standards (Respondent) *(Withdrawn)*

**2666-09-ES:** 1070377 Ontario Inc. o/a Nick's Courier (Applicant) v. Barry Williams and, Director of Employment Standards (Respondent) *(Granted)*

**3052-09-ES:** 1070377 Ontario Inc. o/a Nick's Courier (Applicant) v. Bruce Elliott and, Director of Employment Standards (Respondent) *(Granted)*

**3088-09-ES:** Marisol Simoes a director of Mambo Restaurant 2098972 Ontario Inc. (Applicant) v. Diego Restrepo, and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**3191-09-ES:** Nicola Basile, a Director of City Wide Catering Inc. operating as Papa Nick's Group (Applicant) v. Michael Gallant, John Coticone, Jaywar Narsingh, Peter Vander Heyden, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**3347-09-ES:** Thillainathan Parimalakanthan (Applicant) v. Loxcreen Canada Ltd. and, Director of Employment Standards (Respondent) *(Withdrawn)*

**3600-09-ES:** Universite d'Ottawa (Applicant) v. Nathalie Carrier and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**3775-09-ES:** Shepherd Gourmet Dairy Ontario Inc. (Applicant) v. Vikki Williams and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**3957-09-ES:** T. Hogan General Contracting and Construction (Applicant) v. David Jonasson and, Director of Employment Standards (Respondent) *(Granted)*

**4002-09-ES:** Enterprise 1000 Inc. (Applicant) v. David Gardner and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0208-10-ES:** Nenita Salomon Niquet (Applicant) v. Kerry Newman and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0331-10-ES:** Direct Sales Force Inc. (Applicant) v. Diane St. John and, Director of Employment Standards (Respondent) *(Terminated)*

**0509-10-ES:** Pete Wolf (Applicant) v. Infolink Technologies Corp. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0741-10-ES:** 1631473 Ontario Ltd. DBA Restoration Specialties Co. (Applicant) v. Jason Fyfe and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0787-10-ES:** Benson Tire Inc. (Applicant) v. Michael Kenney and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1102-10-ES:** Nabeel Shaaban (Applicant) v. Alzheimer Society of Windsor - Essex County, Ministry of Labour (Respondent) *(Endorsed Settlement)*

**1114-10-ES:** Bobby Bhar, a director of Children's Corner Day Nursery Inc. (Applicant) v. Natasha Wright and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1115-10-ES:** Bobby Bhar, a director of Children's Corner Day Nursery Inc. o/a Children's Corner Day Nursery (Applicant) v. Pietra Giglio and, Director of Employment Standards (Respondent)*(Endorsed Settlement)*

**1116-10-ES:** Bobby Bhar, a director of Children's Corner Day Nursery Inc. o/a Children's Corner Day Nursery (Applicant) v. Vita Ventura and, Director of Employment Standards (Respondent)*(Endorsed Settlement)*

**1117-10-ES:** Bobby Bhar, a director of Children's Corner Day Nursery Inc. o/a Children's Corner Day Nursery (Applicant) v. Lucia Giglio and, Director of Employment Standards (Respondent)*(Endorsed Settlement)*

**1118-10-ES:** Bobby Bhar, a director of Children's Corner Day Nursery Inc. o/a Children's Corner Day Nursery (Applicant) v. Jasmattie Harinarain and, Director of Employment Standards (Respondent)*(Endorsed Settlement)*

**1120-10-ES:** Bobby Bhar, a director of Children's Corner Day Nursery Inc. o/a Children's Corner Day Nursery (Applicant) v. Tania Pellegrino and, Director of Employment Standards (Respondent)*(Endorsed Settlement)*

**1238-10-ES:** Housework Unlimited (Applicant) v. Kristen Bray, and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1240-10-ES:** 2052172 Ontario Inc. o/a Twisted Bagel (Applicant) v. Brian Wolfman and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1298-10-ES:** Ferro Canada Inc. (Applicant) v. Frank Javier Clarke and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1372-10-ES:** Terence B. Hogan o/a T. Hogan General Contracting & Construction (Applicant) v. John Peremesko and, Director of Employment Standards (Respondent) *(Terminated)*

**1385-10-ES:** J P Towing Service & Storage Ltd. (Applicant) v. Radoslaw Oferczak and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1386-10-ES:** J P Towing Service & Storage Ltd. (Applicant) v. Clint Short and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1421-10-ES:** The Creative Child Learning Centre Inc. (Applicant) v. Christine Taylor and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1453-10-ES:** Flexx Corporation (Applicant) v. Michael Alder and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1465-10-ES:** Metro Radiology Limited o/a Metroradiology (Applicant) v. Heather Powell and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1486-10-ES:** Elisa Raffa (Applicant) v. Aleli S. Jarabelo and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1493-10-ES:** Dana Di Mascio (Applicant) v. Lakeside Performance Gas Services Ltd. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1524-10-ES; 1525-10-ES; 1528-10-ES:** Christopher J. Roper operating as C.J. Roper & Associates Inc. (Applicant) v. Murray D. Kyle and (Respondent); Christopher J. Roper operating as Law Office of Christopher J. Roper (Applicant) v. Murray D. Kyle and (Respondent) *(Terminated)*

**1588-10-ES:** The Kingston Learning Centre Inc. (Applicant) v. Jennifer Willis and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1593-10-ES:** Danuta Mawryczew-Hudek (Applicant) v. 1378371 Ontario Inc. c.o.b. as Tre Mari Bakery and, Director of Employment Standards (Respondent) *(Terminated)*

**1630-10-ES:** Pethealth Services Inc. (Applicant) v. Brianne Bresolin and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1668-10-ES:** 999730 Ontario Inc. o/a Basement Finishing Systems of Southern Ontario (Applicant) v. Cameron Peacock and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1692-10-ES:** 1378768 Ontario Inc. City Centre Collision Csn (Applicant) v. John Jackson and, Director of Employment Standards (Respondent) *(Terminated)*

**1744-10-ES:** 1440847 Ontario Inc. o/a Quiznos Subs (Applicant) v. Sasha Pacheco and, Director of Employment Standards (Respondent) *(Terminated)*

**1761-10-ES:** Tarsem Singh Rayat, a director of 2195793 Ontario Inc. o/a BGA Technologies Corp. (Applicant) v. Rakesh K. Bahl, Subramaniam S. Senthilnathan, Bhaveshkumar S. Tailor and, Director of Employment Standards, 2195793 Ontario Inc. o/a BGA Technologies Corp. (Respondent) *(Terminated)*

**1782-10-ES:** Chhengly Meng (Applicant) v. JFN Enterprises Inc. o/a Tim Horton's and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1854-10-ES:** Landex Construction Inc. (Applicant) v. Andrew Strong, Director of Employment Standards (Respondent) *(Withdrawn)*

**1866-10-ES:** Apollo Restaurant & Pizzeria Ltd. operating as Apollo Restaurant & Pizzeria (Applicant) v. Andrew Pinsent and, Director of Employment Standards (Respondent) *(Terminated)*

**1882-10-ES:** Stream International Canada Inc. (Applicant) v. Jason Kerr, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1922-10-ES:** Alternative Hair Design & Esthetics Inc. (Applicant) v. Nisha Ouellette and, Director of Employment Standards (Respondent) *(Terminated)*

**1948-10-ES:** Chris N. Dumoulin (Applicant) v. Cochrane Polar Bear Habitat and Heritage Village and, Director of Employment Standards (Respondent) *(Terminated)*

**2048-10-ES:** John Logan Chevrolet Inc. (Applicant) v. Brian Giles and, Director of Employment Standards (Respondent) *(Terminated)*

**2112-10-ES:** Shawn Edmund Wilson operating as Greener Pastures Lawn Maintenance and Snow Plowing (Applicant) v. Loni Dolbratz and, Director of Employment Standards (Respondent) *(Terminated)*

**2153-10-ES:** Babu Azim Ramji (Applicant) v. Hue's Kitchen Ltd. o/a Hu Kitchen Restaurant, Director of Employment Standards (Respondent) *(Terminated)*

**2159-10-ES:** Wayne E. Tanner (Applicant) v. Bluewater District School Board, Director of Employment Standards (Respondent) *(Dismissed)*

## APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

**2075-08-HS:** The Corporation of the City of Windsor (Applicant) v. Canadian Union of Public Employees, Local 543 and, Richard Taggart, Inspector (Respondent) *(Withdrawn)*

**0030-10-HS:** Richard McCurdy (Applicant) v. City of Vaughan Fire and Rescue Department and, Robert Rae, Inspector (Respondent) *(Withdrawn)*

**1840-10-HS:** Dufferin Construction Company (Applicant) v. Labourers International Union of North America - Local 837, International Union of Operating Engineers - Local 793 and, Jullie Ritchie, Inspector (Respondent) *(Withdrawn)*

**2017-10-HS:** Con-Cast Pipe Inc. (Applicant) v. CAW Local 1917 and, Price Teeter, Inspector (Respondent) *(Withdrawn)*

**2080-10-HS:** Dollarama L.P. (Applicant) v. John Reid, Inspector (Respondent) *(Dismissed)*

**2108-10-HS:** Dollarama L.P. (Applicant) v. Patricia Sobczuk, Inspector (Respondent) *(Dismissed)*

**2181-10-HS:** Dollarama L.P. (Applicant) v. John Reid, Inspector (Respondent) *(Dismissed)*

## FIRST AGREEMENT - DIRECTION

**1816-10-FC:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. James Conci Holdings Inc. (Respondent) *(Granted)*

## PAY EQUITY ACT

**0439-09-PE:** Queensway Nursing Home (Applicant) v. Group of Confidential Employees (Respondent) *(Granted)*

**0958-09-PE:** Canadian Union of Public Employees, Local 543.3 (Applicant) v. Windsor-Essex County Health Unit (Respondent) *(Dismissed)*

**1873-09-PE:** Lynn Hudson (Applicant) v. Hamilton Police Association (Respondent) *(Dismissed)*

**2797-09-PE:** Pay Equity Commission (Applicant) v. 2059419 Ontario Inc. (formerly operating as Comfort Inn Motel (Welland)) (Respondent) *(Granted)*

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**1858-07-ES:** Brian Gordon Plenderleith (Applicant) v. Decoma International Inc. o/a Rimply Decoma and, Director of Employment Standards (Respondent) *(Dismissed)*

**0020-09-PE:** Phung Kim Quach (Applicant) v. St. Christopher House, and, Canadian Union of Public Employees, Local 3393 (Respondent) *(Dismissed)*

**2359-09-U:** Miguel Martin Avila (Applicant) v. Canadian Union of Public Employees and its Local 1600 (Respondent) v. Board of Management for the Toronto 10o (Intervener) *(Dismissed)*

**0216-10-U:** Sheikh-Nur Mohamud (Applicant) v. United Food and Commercial Workers Canada, Local 175 (Respondent) v. National Car Rental (Intervener) *(Dismissed)*

**0594-10-U:** Nerissa James (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) v. Revera Retirement LP o/a Terrace Gardens Retirement Residence (Intervener) *(Dismissed)*

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 2010

## APPLICATIONS FOR CERTIFICATION

### Bargaining Agents Certified Without Vote

**3448-08-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Norlon Builders London Limited (Respondent)

Unit: "all construction labourers in the employ of Norlon Builders London Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Norlon Builders London Limited in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit)

**0551-09-R:** Labourers' International Union of North America (Applicant) v. 1367027 Ontario Inc. (Respondent)

Unit: "all construction labourers and carpenters and carpenters' apprentices in the employ of 1367027 Ontario Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**1959-09-R:** The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Michele Magnante c.o.b. as Magnante Painting (Respondent)

Unit: "all painters and painters' apprentices in the employ of Michele Magnante c.o.b. as Magnante Painting in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Michele Magnante c.o.b. as Magnante Painting in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

**2714-09-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Lorron Technologies Inc. (Respondent)

Unit: "all construction labourers in the employ of Lorron Technologies Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0984-10-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1177020 Ontario Inc. 0/a Acculine Road Markings (Respondent)

Unit: "all construction labourers in the employ of 1177020 Ontario Inc. o/a Acculine Road Markings in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**1960-10-R:** Labourers' International Union of North America, Local 625 (Applicant) v. Belanger Concrete Inc. (Respondent)

Unit: "all construction labourers in the employ of Belanger Concrete Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Belanger Concrete Inc., in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**2189-10-R:** Labourers' International Union of North America, Local 1089 (Applicant) v. Universal Concrete Services (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener)

Unit: "all construction labourers in the employ of Universal Concrete Services in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**2354-10-R:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Roxform Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Roxform Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Roxform Inc. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**2426-10-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Airtime Canada ULC c.o.b. as 21 Degrees Heating and Air Conditioning (Respondent)

Unit: "all journeyman and apprentice refrigeration and air conditioning mechanics in the employ of Airtime Canada ULC c.o.b. as 21 Degrees Heating and Air Conditioning in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland and the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**2627-10-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Toromont Industries Ltd. c.o.b. as Climate Control (Respondent)

Unit: "all refrigeration and air conditioning mechanics and refrigeration and air conditioning mechanics' apprentices in the employ of Toromont Industries Ltd. c.o.b. as Climate Control in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all refrigeration and air conditioning mechanics and refrigeration and air conditioning mechanics' apprentices in the employ of Toromont Industries Ltd. c.o.b. as Climate Control in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman all refrigeration and air conditioning mechanics and refrigeration and air conditioning mechanics' apprentices in the employ of Toromont Industries Ltd. c.o.b. as Climate Control in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**2644-10-R:** International Brotherhood of Painters and Allied Trades, Local 557 (Applicant) v. Erinwall Decorating Limited (Respondent)

Unit: "all painters and painters' apprentices in the employ of Erinwall Decorating Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Erinwall Decorating Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (3 employees in unit)

**2710-10-R:** Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. 371616 Ontario Limited c.o.b. as R & J Mechanical (Respondent)

Unit: "all plumbers and plumbers, apprentices and all pipefitters and pipefitters, apprentices in the employ of 371616 Ontario Limited c.o.b. as R & J Mechanical in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers, apprentices and all pipefitters and pipefitters, apprentices in the employ of 371616 Ontario Limited c.o.b. as R & J Mechanical in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of nonworking foreman." (5 employees in unit)

## Bargaining Agents Certified Subsequent to Vote

**1560-08-R:** Retail, Wholesale and Department Store Union, District Council of the United Food and Commercial Workers International Union (Applicant) v. 1783409 Ontario Inc. carrying on business as Twin Points Price Chopper (Respondent)

Unit: "all employees of 1783409 Ontario Inc. carrying on business as Twin Points Price Chopper, in the City of North Bay, save and except one (1) Assistant Store Manager, Department Managers (not to exceed one (1) per department) and persons above the rank of Department Manager" (59 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 66 |
| Number of persons who cast ballots | 48 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 45 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 3 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 28 |
| Number of ballots marked against applicant | 20 |
| Number of ballots segregated and not counted | 0 |

**4005-09-R:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Public Service Alliance of Canada (Respondent) v. Alliance Employees' Union (Intervener)

Unit: "all employees of the employer employed in an officer capacity in Ottawa, save and except employees of the Public Service Alliance of Canada covered under a subsisting collective agreement in another bargaining unit, elected officers of the Public Service Alliance of Canada, and persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations. The following field positions are recognized as part of this same bargaining unit: Negotiator, Regional Education Officer, Grievance and Adjudicator Officer, Legal Officer, Research Officer." (111 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 115 |
| Number of persons who cast ballots | 86 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 70 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 45 |
| Number of ballots marked in favour of intervener | 41 |
| Number of ballots segregated and not counted | 0 |

**1276-10-R:** Service Employees International Union Local 2 Brewery, General & Professional Workers' Union (Applicant) v. Royal Victoria Hospital (Respondent)

Unit: "all security officers employed by the Royal Victoria Hospital in the City of Barrie, save and except supervisors, those above the rank of supervisor and persons for whom any other trade union held bargaining rights as of July 8, 2010" (14 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 15 |
| Number of persons who cast ballots | 13 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 12 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 1 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 12 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 1 |

**1422-10-R:** Labourers' International Union of North America, Local 625 (Applicant) v. Able Environmental Services Inc. (Respondent)

Unit: "all employees of Able Environmental Services Inc. working in and out of the City of Windsor, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (6 employees in unit) *(Having regard to the agreement of the parties.)*

**1820-10-R:** Elementary Teachers' Federation of Ontario (Applicant) v. Halton District School Board (Respondent) v. Canadian Union of Public Employees and its Local 1011, Halton District Educational Assistants' Association (Intervener)

Unit: "all employees employed as designated Early Childhood Educators (as defined by the Education Act) on a regular basis (not including Occasional designated Early Childhood Educators) in the Early Learning Program at Halton District School Board in Halton Region, save and except supervisors and persons above the rank of supervisor and those persons already represented by a trade union" (50 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 49 |
| Number of persons who cast ballots | 30 |

| | |
|---|---|
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 30 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 41 |
| Number of ballots marked against applicant | 1 |
| Number of ballots segregated and not counted | 0 |

**1906-10-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of The Town of Tecumseh (Respondent)

Unit: "all employees of the Corporation of the Town of Tecumseh, in the Town of Tecumseh, regularly employed for not more than twenty-four (24) hours per week and seasonal employees employed during the period of March 15, to December 15 of any year save and except supervisors and persons above the rank of supervisor, clerical and technical employees, students employed during the school vacation periods, volunteer firefighters and employees already represented by a trade union" (9 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 28 |
| Number of persons who cast ballots | 18 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 10 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 8 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 12 |
| Number of ballots marked against applicant | 6 |
| Number of ballots segregated and not counted | 0 |

**2138-10-R:** Workers United Ontario Council (Applicant) v. Kimwest Hotel Enterprises Ltd. and Westlight Hotel Services Ltd. 0/a Travelodge Windsor (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Kimwest Hotel Enterprises Ltd. and Westlight Hotel Services Ltd. o/a Travelodge Windsor employed at 33 Riverside Drive East, save and except supervisors and those above the rank of supervisor, office staff and accounting staff" (21 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 21 |
| Number of persons who cast ballots | 16 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 16 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 15 |
| Number of ballots marked against applicant | 1 |

**2179-10-R:** Ontario Secondary School Teachers' Federation (OSSTF/FEESO) (Applicant) v. Brant Haldimand Norfolk Catholic District School Board (Respondent)

Unit: "all employees employed as Early Childhood Educators by the Brant Haldimand Norfolk Catholic District School Board, save and except supervisors and persons above the rank of supervisor" (6 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 10 |
| Number of persons who cast ballots | 6 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 6 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 6 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2183-10-R:** Teamsters / Graphic Communications Conference - Local 41M (Applicant) v. BA International Inc. (Respondent)

Unit: "all employees of BA International Inc. at 975 Gladstone Avenue, Ottawa employed in the Letterpress Department excluding Supervisors and those above the rank of Supervisor" (8 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 9 |
| Number of persons who cast ballots | 8 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 8 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 8 |
| Number of ballots marked against applicant | 0 |

**2228-10-R:** Teamsters Local Union No. 419 (Applicant) v. Millard Refrigerated Services-Canada, ULC (Respondent)

Unit: "all employees of Millard Refrigerated Services-Canada, ULC in the City of Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, and sales staff" (87 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 108 |
| Number of persons who cast ballots | 100 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 88 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 11 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 1 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 66 |
| Number of ballots marked against applicant | 22 |
| Number of ballots segregated and not counted | 12 |

**2233-10-R:** Service Employees International Union Local 1 Canada (Applicant) v. Yee Hong Centre for Geriatric Care Scarborough McNicoll (Respondent)

Unit: "all employees at the Yee Hong Centre for Geriatric Care Scarborough McNicoll in the City of Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical employees, social workers and chaplain" (166 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 165 |
| Number of persons who cast ballots | 140 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 109 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 29 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 2 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 94 |
| Number of ballots marked against applicant | 17 |
| Number of ballots segregated and not counted | 29 |

**2273-10-R:** Labourers' International Union of North America, Ontario Provincial District Council (Respondent)

Unit: "all employees of R-Home Security Ltd. o/a Advanced Security and Investigation Services at the Lower Mattagami Dam project in the Townships of O'Brien, Teetzel, Gurney, Fauquier, Nansen, Swanson, Sulman, Owens, Williamson, Harmon, Bradley, Boyle, Mowbray, Cockshutt, Emerson, Kipling, Acres, Howells, Clay, Hopkins and Guilfoyle, save and except managers, and persons above the rank of manager and office, sales and clerical staff" (15 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 16 |
| Number of persons who cast ballots | 10 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 10 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 10 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2278-10-R:** Workers United Ontario Council (Applicant) v. Compass Group Canada Ltd. (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Compass Group Canada Ltd. at the American Express Administrative Building, 101 McNabb Street, in the Town of Markham, save and except supervisors, persons above the rank of supervisor, chef and office and sales staff" (20 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 19 |
| Number of persons who cast ballots | 15 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 15 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |

| | |
|---|---|
| Number of ballots marked in favour of applicant | 15 |
| Number of ballots marked against applicant | 0 |

**2280-10-R:** Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Victorian Order of Nurses Canada, Ontario Branch, Perth Huron Site (Respondent)

Unit: "all Flu and Wellness Coordinator, Administrative Support/Assistant employees employed by the Victorian Order of Nurses Canada, Ontario Branch, Perth Huron Site, in the City of Stratford, save and except the Supervisors, Administrative and Fund Development Assistant, Administrative Coordinator Community Support Service and those above the rank of Supervisors" (2 employees in unit) *(Having regard to the agreement of the parties.)*

**2290-10-R:** Canadian National Federation of Independent Unions (Applicant) v. 110798898 Ontario Limited o/a Nutra 2000 (Respondent)

Unit: "all employees of 110798898 Ontario Limited o/a Nutra 2000, in the City of Ottawa save and except office and clerical staff, receptionists, Supervisors, Directors or Coordinators and persons above the rank of Supervisor, Directors or Coordinators" (14 employees in unit) *(Having Regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 14 |
| Number of persons who cast ballots | 11 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 10 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 1 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 10 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 1 |

**2312-10-R:** Ontario Nurses' Association (Applicant) v. Hampton Terrace Care Centre (Respondent)

Unit: "all registered nurses and nurses with a temporary certificate of registration employed in a nursing capacity by the Hampton Terrace Care Centre located in the City of Burlington, save and except managers, persons above the rank of manager, and persons covered by a subsisting collective agreement" (6 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 11 |
| Number of persons who cast ballots | 9 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 9 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 5 |
| Number of ballots marked against applicant | 4 |
| Number of ballots segregated and not counted | 0 |

**2323-10-R:** Ontario Public Service Employees Union (Applicant) v. Misiway Milopemahtesewin Community Health Centre (Respondent)

Unit: "all employees of Misiway Milopemahtesewin Community Health Centre in the City of Timmins, save and except supervisors and persons above the rank of supervisor" (10 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 9 |
| Number of persons who cast ballots | 9 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 9 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 9 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2345-10-R:** Ontario Nurses' Association (Applicant) v. The Brant Centre LTC Residence (Respondent)

Unit: "all registered nurses and nurses with a temporary certificate of registration employed by the Brant Centre LTC in the City of Burlington, save and except managers, persons above the rank of manager and persons in bargaining units for which any trade union held bargaining rights as of October 21, 2010" (9 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 11 |
| Number of persons who cast ballots | 9 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 9 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 9 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2387-10-R:** Ontario Public Service Employees Union (Applicant) v. Kirkland and District Hospital (Respondent)

Unit: "all paramedical employees of Kirkland and District Hospital in the Town of Kirkland Lake, save and except supervisors and those above the rank of supervisor and persons for whom any trade union held bargaining rights as of October 25, 2010" (25 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 28 |
| Number of persons who cast ballots | 18 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 18 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 14 |
| Number of ballots marked against applicant | 4 |
| Number of ballots segregated and not counted | 0 |

**2423-10-R:** Workers United Ontario Council (Applicant) v. Women's Hostels Inc. (Nellie's) (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Women's Hostels Inc. (c.o.b. as Nellie's) in the City of Toronto, save and except supervisors and persons above the rank of supervisor, the Administrative and Communication Co-ordinator, the Development Administrative Support Worker, the Manager of Finance and Administration, the Manager of Fundraising, the Program Manager, and the Executive Director" (31 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 39 |
| Number of persons who cast ballots | 17 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 17 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 17 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2434-10-R:** National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada) (Applicant) v. Auto Warehousing Company Canada Limited (Respondent)

Unit: "all office and clerical employees of Auto Warehousing Company Canada Limited at the Windsor, Ontario terminal, excluding foremen and supervisors, rail car dispatchers, confidential secretary, security guards, janitors, part time employees, students employed during the school vacation and employees covered by a subsisting collective agreement" (4 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 3 |
| Number of persons who cast ballots | 3 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 3 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 3 |
| Number of ballots marked against applicant | 0 |
| Number of ballots segregated and not counted | 0 |

**2451-10-R:** United Association of Journeymen and Apprentices of the Plumbing and PipefittingIndustry of the United States and Canada, Local 787 (Applicant) v. Airtime Canada ULC o/a 21Degrees Heating and Air Conditioning (Respondent)

Unit: "all journeyperson and apprentice refrigeration and air-conditioning mechanics employed by Airtime Canada ULC o/a 21 Degrees Heating and Air Conditioning at or out of Trenton and Kingston, Ontario, performing heating, ventilation and air-conditioning service and maintenance work save and except non-working forepersons and persons above the rank of non-working foreperson" (7 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 5 |
| Number of persons who cast ballots | 11 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 5 |

| | |
|---|---|
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 6 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 6 |
| Number of ballots marked against applicant | 5 |
| Number of ballots segregated and not counted | 0 |

**2494-10-R:** Service Employees International Union Local 2 (Applicant) v. Service Star Building Cleaning Inc. (Respondent)

Unit: "all employees of Service Star Building Cleaning Inc. working at 301 Wellington Avenue in the City of Ottawa, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 11 |
| Number of persons who cast ballots | 7 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 7 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 5 |
| Number of ballots marked against applicant | 2 |

**2555-10-R:** Ontario Nurses' Association (Applicant) v. Yee Hong Centre for Geriatric Care (Mississauga Centre) (Respondent)

Unit: "all registered nurses and nurses with a temporary certificate of registration employed by the Yee Hong Centre for Geriatric Care (Mississauga Centre), save and except the Assistant Director of Care, and persons above the rank of the Assistant Director of Care" (21 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 22 |
| Number of persons who cast ballots | 15 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 15 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 14 |
| Number of ballots marked against applicant | 1 |
| Number of ballots segregated and not counted | 0 |

**2568-10-R:** Service Employees International Union Local 1 Canada (Applicant) v. Mon Sheong Richmond Hill Long Term Care Centre (Respondent)

Unit: "all employees of Mon Sheong Richmond Hill Long Term Care Centre in the Town of Richmond Hill, save and except supervisors, persons above the rank of supervisor, Registered Nurses, and office and clerical staff" (210 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 208 |
| Number of persons who cast ballots | 185 |

| | |
|---|---|
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 181 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 4 |
| Number of spoiled ballots | 1 |
| Number of ballots marked in favour of applicant | 114 |
| Number of ballots marked against applicant | 66 |
| Number of ballots segregated and not counted | 4 |

**2569-10-R:** Canadian Union of Public Employees (Applicant) v. Nucleus Independent Living (Respondent)

Unit: "all attendants (includes Personal Support Workers) employed by Nucleus Independent Living providing personal and housekeeping services to adults of all ages in the Supports for Daily Living Program and the Attendant Outreach Program and Customer Services Representatives in the Supports for Daily Living Program; save and except for coordinators, supervisors, persons above the rank of supervisors, and those currently covered by a collective agreement, in the cities of Etobicoke (south 401 and West of Islington), Mississauga, Oakville and Brampton" (117 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 120 |
| Number of persons who cast ballots | 88 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 85 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 3 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 59 |
| Number of ballots marked against applicant | 29 |
| Number of ballots segregated and not counted | 0 |

**2600-10-R:** Canadian Union of Public Employees (Applicant) v. Gateway House operating as Newgate 180 (Respondent)

Unit: "all employees employed by Gateway House operating as Newgate 180 in the Town of Manotick and the Town of Merrickville in the Region of Ottawa in the province of Ontario save and except director and persons above the rank of director" (20 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 21 |
| Number of persons who cast ballots | 12 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 12 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 8 |
| Number of ballots marked against applicant | 4 |

**2615-10-R:** UFCW Canada, Local lOOQA (Applicant) v. LensCrafters International, Inc. (Respondent)

Unit: "all employees of LensCrafters International, Inc., located at 3401 Dufferin Street, Toronto, Ontario of the Yorkdale Shopping Centre, save and except General Manager, Retail Manager, Lab Manager, Sales Supervisor and persons above the rank of Sales Supervisor" (17 employees in unit) *(Having regard to the agreement of the parties.)*

| | |
|---|---|
| Number of names of persons on revised voters' list | 17 |
| Number of persons who cast ballots | 17 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 17 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 13 |
| Number of ballots marked against applicant | 4 |
| Number of ballots segregated and not counted | 0 |

## Applications for Certification Dismissed Without Vote

**1675-07-R:** Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Kylemore Homes and/or Kylemore Homes Ltd. and/or Kylemore (Bayview Meadows) Ltd. and/or Kylemore Communities (West Village) Ltd., Kylemore (Chapman Court) Ltd. (Respondent)

**2156-10-R:** National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Cara Operations Limited (Respondent) v. Teamsters Local Union No. 419 (Intervener)

**2714-10-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Puddy Brothers Ltd. Division of Maple Lodge Farms Ltd. (Respondent)

## Applications for Certification Dismissed Subsequent to Vote

**1551-02-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Applicant) v. Prairie Plumbing Ltd. (Respondent)

Unit: "all plumbers' and plumbers' apprentices and all steamfitters' and steamfitters' apprentices in the employ of Prairie Plumbing Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry, excluding the industrial, commercial and institutional sector of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; and the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 10 |
| Number of persons who cast ballots | 10 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 8 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 2 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 5 |
| Number of ballots marked against applicant | 5 |
| Number of ballots segregated and not counted | 0 |

**1265-08-R:** Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Struct-Con Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Struct-Con Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the responding party in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 5 |
| Number of persons who cast ballots | 4 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 4 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of ballots marked in favour of applicant | 2 |
| Number of ballots marked against applicant | 2 |
| Number of ballots segregated and not counted | 0 |

**1480-08-R:** Canadian National Federation of Independent Unions (Applicant) v. Superior Boiler Works & Welding Ltd. (Respondent) v. Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67, and, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Intervener)

Unit: "all employees of the employer working in or out of the City of Hamilton, save and except office and clerical staff, students employed during the summer vacation period, supervisors and those employees above the rank of supervisor." (77 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 77 |
| Number of persons who cast ballots | 67 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 62 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 5 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 46 |
| Number of ballots marked against applicant | 19 |
| Number of ballots segregated and not counted | 2 |

**2194-10-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 affiliated with the International Brotherhood of Teamsters (Applicant) v. Pestell Pet Products Inc. (Respondent)

Unit: "all employees of the responding party employed at 141 Hamilton Road, New Hamburg, Ontario, save and except Managers and those above the rank of Manager, quality assurance, purchasing, clerical, office and sales employees." (5 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | S |
| Number of persons who cast ballots | 5 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 4 |

| | |
|---|---|
| Number of segregated ballots cast by persons whose names appear on voter's list | 1 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 2 |
| Number of ballots marked against applicant | 2 |
| Number of ballots segregated and not counted | 1 |

**2241-10-R:** Grand River Valley Health Care Employees Union Local 305 affiliated with the Christian Labour Association of Canada (Applicant) v. Forest Heights Long Term Care Centre (Respondent) v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Intervener)

Unit: "all employees of Forest Heights Long Term Care Centre owned and operated by Revera Living at its Nursing home at Kitchener, Ontario, save and except registered and graduate nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor and office staff" (220 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 239 |
| Number of persons who cast ballots | 145 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 143 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 2 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 1 |
| Number of ballots marked in favour of applicant | 38 |
| Number of ballots marked against applicant | 104 |
| Number of ballots segregated and not counted | 2 |

**2359-10-R:** United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Signature Living Corporation and/or, Signature Living Management Inc. o/a Hollandview Trail Retirement Community (Respondent)

Unit: "all employees of Signature Living Corporation and/or Signature Living Management Inc. o/a Hollandview Trail Retirement Community in the Town of Aurora save and except supervisors, persons above the rank of supervisor, office, clerical, sales and marketing employees" (60 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 58 |
| Number of persons who cast ballots | 54 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 53 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 1 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 25 |
| Number of ballots marked against applicant | 28 |
| Number of ballots segregated and not counted | 1 |

**2363-10-R:** Power Workers' Union, Canadian Union of Public Employees, Local 1000 CLC (Applicant) v. Capital Power Corporation (Respondent)

Unit: "all employees of Capital Power Corporation in the City of North Bay, Ontario, save and except supervisors and those above the rank of supervisor" (10 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 10 |
| Number of persons who cast ballots | 10 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 10 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 4 |
| Number of ballots marked against applicant | 6 |
| Number of ballots segregated and not counted | 0 |

**2536-10-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Bunge Canada (Respondent)

Unit: "all employees of Bunge Canada employed in the Town of Oakville save and except Supervisors, persons above the rank of Supervisors, Quality Control, Office and Sales staff" (33 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 34 |
| Number of persons who cast ballots | 34 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 34 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of applicant | 13 |
| Number of ballots marked against applicant | 21 |
| Number of ballots segregated and not counted | 0 |

## Applications for Certification Withdrawn

**2083-09-R:** Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. P. A. Catch Basin Cleaning Services Inc. (Respondent)

**2731-09-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lorron Technologies Inc. (Respondent)

**0389-10-R:** Sheet Metal Workers' International Association, Local 51 (Applicant) v. Donia Aluminum & Roofing Limited (Respondent) v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

**1058-10-R:** United Brotherhood of Carpenters and Joiners of America, Local 27 (Applicant) v. The Governing Council of the University of Toronto (Respondent)

**1827-10-R:** United Food and Commercial Workers Canada, Local 1000A (Applicant) v. Aspect Retail Logistics (also known as Metro Supply Chain Group of Companies, also known as Metro Canada Logistics, also known as Harmony Logistics) (Respondent)

**2670-10-R:** Canadian Union of Public Employees (Applicant) v. Kids and Company (Respondent)

**2797-10-R:** Syndicat Canadien de la Fonction Publique (Applicant) v. L'Association des auxiliaires/bénévoles de L'Hôpital Montfort (Respondent)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**2256-09-R:** Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated Local Unions: 1007, 1151, 1244, 1410, 1592, 1916 and 2309 (Applicant) v. Trentfab Inc., Trentfab Industrial Contractors Inc., 2198430 Ontario Inc. and, Brian Kinmond (Respondent) *(Withdrawn)*

## SALE OF A BUSINESS

**1405-03-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. SNC-Lavalin Inc., SNC, The Group, SNC Services Ltd., SNC/FW Ltd., SNC-Lavalin Engineers & Constructors Inc. (Respondent) *(Granted)*

**1564-09-R:** The Ontario Secondary School Teachers' Federation (OSSTF) (Applicant) v. The Simcoe Muskoka Catholic District School Board and, The Parry Sound District Roman Catholic Separate School Board (Respondent) v. Canadian Union of Public Employees and its Locals 3987.01 and 3987.02 (Intervener) *(Granted)*

**2375-09-R:** International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Trentfab Inc., Trentfab Industrial Contractors Inc., 2198430 Ontario Inc. (Respondent) *(Withdrawn)*

**2005-10-R:** Labourers' International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Locals (Applicant) v. Pace Enterprises (1998) Inc., EMNM Concrete Contracting a Division of 2196640 Ontario Inc.; 2196640 Ontario Inc. (Respondent) *(Granted)*

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2843-09-R:** Atlantic Lifts Ltd. (Applicant) v. International Union of Elevator Constructors, Local 50 (Respondent) *(Withdrawn)*

**3859-09-R:** Gordon M. Jeffrey (Applicant) v. International Union of Elevator Constructors, Local 50 (Respondent) v. Atlantic Lifts Ltd. (Intervener) *(Granted)*

Unit: "all elevator constructors and elevator constructors' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all elevator constructors and elevator constructors' apprentices in the employ of the responding party in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 7 |
| Number of persons who cast ballots | 7 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 7 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of ballots marked in favour of respondent | 2 |
| Number of ballots marked against respondent | 1 |
| Number of ballots segregated and not counted | 4 |

**2442-10-R:** Daniel Boden and Pat Peterson (Applicant) v. Teamsters Local 847 (Respondent) v. The Salvation Army (Intervener) *(Dismissed)*

Unit: "all employees of the Salvation Army Central Ontario Recycling Operation, employed in the transportation and production departments at 2360 South Service Road, Oakville, Ontario, save and except Assistant Supervisors and those above the rank of Assistant Supervisor, office, clerical, administrative and accounting staff, Salvation Army officers and persons enrolled in programs offered by the Salvation Army." (45 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 43 |
| Number of persons who cast ballots | 38 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 38 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of respondent | 22 |
| Number of ballots marked against respondent | 16 |
| Number of ballots segregated and not counted | 0 |

**2450-10-R:** The Employees of Hollander Canada Home Fashions Limited (Applicant) v. Workers United Ontario Council Local 437 (Respondent) *(Dismissed)*

**2492-10-R:** Beverly Ladouceur (Applicant) v. Service Employees International Union Local 1 Canada (Respondent) *(Dismissed)*

**2602-10-R:** Melissa Larabie (Applicant) v. The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 598 (Respondent) v. Valley East Long Term Care Centre Inc. o/a Elizabeth Centre (Intervener) *(Dismissed)*

**2610-10-R:** Thomas Hall (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Workers Local 14241 (Respondent) v. Equine Forgings Limited (Intervener) *(Terminated)*

Unit: "all employees of Equine Forgings Limited in the Town of Fort Erie, save and except managers, supervisors, office, clerical and sales staff" (6 employees in unit)

| | |
|---|---|
| Number of names of persons on revised voters' list | 6 |
| Number of persons who cast ballots | 6 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 6 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 0 |
| Number of ballots marked in favour of respondent | 0 |
| Number of ballots marked against respondent | 6 |
| Number of ballots segregated and not counted | 0 |

**2806-10-R:** Laura Stirling (Applicant) v. UNITE HERE Local 75 (Respondent) *(Terminated)*

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**2259-07-U:** Wendy Gagne (Applicant) v. Canadian Auto Workers Union (CAW-Canada), LOCAL NO. 2458 (Respondent) *(Dismissed)*

**2583-08-U:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. The Restorers Group Inc. (Respondent) *(Withdrawn)*

**2980-08-U:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. The Restorers Group Inc. (Respondent) *(Withdrawn)*

**2981-08-U:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. The Restorers Group Inc. (Respondent) *(Withdrawn)*

**2983-08-U:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. The Restorers Group Inc. (Respondent) *(Withdrawn)*

**1140-09-U:** Neville Gray, Dwayne Lewis and Charles Kabula (Applicant) v. CAW Local 414 (Respondent) v. Metro Ontario Inc. (Intervener) *(Dismissed)*

**2172-09-U:** Lilia Aleli Galang (Applicant) v. United Food and Commercial Workers Canada, Local lOOQA (Respondent) v. Loblaw Companies Limited (Intervener) *(Withdrawn)*

**2258-09-U:** Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated Local Unions: 1007, 1151, 1244, 1410, 1592, 1916 and 2309 (Applicant) v. Trentfab Inc., Trentfab Industrial Contractors Inc., 2198430 Ontario Inc. and, Brian Kinmond (Respondent) *(Withdrawn)*

**2269-09-U:** Darrin Frank Babichuk (Applicant) v. Teamsters Local Union No. 1979 (Respondent) *(Dismissed)*

**2844-09-U:** Atlantic Lifts Ltd. (Applicant) v. International Union of Elevator Constructors, Local 50 (Respondent) *(Withdrawn)*

**2907-09-U:** International Union of Elevator Constructors, Local 50 (Applicant) v. Atlantic Lifts Ltd. (Respondent) *(Withdrawn)*

**2927-09-U:** Paul O'Connor (Applicant) v. Ontario Public Service Employees Union "OPSEU" (Respondent) v. The Crown in Right of Ontario (as represented by the Ministry of Revenue) (Intervener) *(Dismissed)*

**3046-09-U:** Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1059 (Applicant) v. Lorron Technologies Inc. (Respondent) *(Withdrawn)*

**3097-09-U:** Kathryn Bernath (Applicant) v. C.U.P.E. Local 905 (Respondent) v. New Tecumseth Public Library Board (Intervener) *(Dismissed)*

**3581-09-U:** Sheryl Anuie Toop (Applicant) v. Canadian Union of Public Employees and, CUPE Local 1974 (Respondent) *(Granted)*

**3855-09-U:** Joe Schifano, Elvira Capisciolto, Alex Gogos, Amirchand Dhir and, Rose Yeboah (Applicant) v. Bakery, Confectionary & Tobacco Workers International Union, AFL-CIO,CLC, Local 264 (Respondent) *(Withdrawn)*

**3897-09-U:** Billy Chou, Joe Schifano, Elvira Capisciolto, Alex Gogos, Amirchand Dhir and, Rose Yeboah (Applicant) v. Bakery, Confectionary & Tobacco Workers International Union, AFL-CIO,CLC, Local 264 and, Canada Bread Company, Limited (Respondent) *(Withdrawn)*

**0148-10-U:** International Union of Operating Engineers, Local 793 (Applicant) v. R.M. Belanger Limited (Respondent) *(Endorsed Settlement)*

**0182-10-U:** Dalibor Mrkobrad (Applicant) v. Canadian Union of Public Employees and its Local 2544 (Respondent) v. Peel District School Board (Intervener) *(Dismissed)*

**0295-10-U:** United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting Industry of The United States and Canada, Local 67 (Applicant) v. E.S. Fox Limited (Respondent) v. Electrical Power Systems Construction Association ("EPSCA") (Intervener) *(Withdrawn)*

**0351-10-U:** Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. The Corporation of the County of Simcoe (Respondent) *(Withdrawn)*

**0475-10-U:** Charlie Jonczyk (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1285 (Respondent) v. Daimler Buses North America Ltd. (Intervener) *(Dismissed)*

**0607-10-U:** Sandra Mahoney (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 444 (Respondent) v. Windsor Casino Limited (Intervener) *(Dismissed)*

**0632-10-U:** Alika Curtis-Clarke (Applicant) v. United Food and Commercial Workers International Union, Locals 175 and 633 (Respondent) v. Metro Ontario Inc. (Intervener) *(Dismissed)*

**0659-10-U:** Henock Gabeyehu (Applicant) v. Universal Workers Union, Labourers' International Un:Lon of North America Local 183 (Respondent) *(Dismissed)*

**0661-10-U:** Wouleta Tadesse (Applicant) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Respondent) *(Dismissed)*

**0690-10-U:** Amanda Wither-Robinson (Applicant) v. Halton District Educational Assistants Association and Lyrme Gurzi (Respondent) v. Halton District School Board (Intervener) *(Withdrawn)*

**0883-10-U:** Silvano Lochner (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Municipal Property Assessment Corporation (Intervener) *(Dismissed)*

**0944-10-U:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Agrium Advanced Technologies Inc. and, Manpower Services Canada Limited (Respondent) *(Withdrawn)*

**1214-10-U:** International Union of Painters and Allied Trades, Local Union 1795, (Glaziers) (Applicant) v. 1440842 Ontario Inc. o/a KYIV Architectural Metals (Respondent) *(Endorsed Settlement)*

**1272-10-U:** Vladimir Radovic (Applicant) v. National Automobile, Aerospace Transportation and General Workers' Union of Canada, CAW-Canada and its Local Union No. 555 (CAW Local No. 555) (Respondent) v. McMaster University (Intervener) *(Withdrawn)*

**1492-10-U:** Labourers' International Union of North America, Local 625 (Applicant) v. Able Environmental Services Inc. and, Manufacturing, Transportation, and Allied Workers Union, Local 519, affiliated with Christian Labour Association of Canada (Respondent) *(Withdrawn)*

**1615-10-U:** Manufacturing, Transportation and Allied Workers Union, Local 519, affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. Able Environmental Services Inc. and, Labourers' International Union of North America, Local 625 (Respondent) *(Withdrawn)*

**1747-10-U:** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Protocol Global Solutions (Respondent) *(Withdrawn)*

**1825-10-U:** Jose Toribio (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) *(Withdrawn)*

**1845-10-U:** The Employees That Do Not Wish To Be Represented By The Ontario Public Services Employees Union (Applicant) v. Ontario Public Services Employees' Union (Respondent) *(Withdrawn)*

**1884-10-U:** Logistics Logistics, United Food and Commercial Workers Canada, Local 1000A (Applicant) v. Aspect Retail (also known as Metro Supply Chain Group of Companies, also known as Metro Canada also known as Harmony Logistics) (Respondent) *(Withdrawn)*

**1976-10-U:** United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Richelieu Hardware Ltd. (Respondent) *(Withdrawn)*

**1978-10-U:** Plumbers Residential Council, Ontario and its Affiliate United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 221 (Applicant) v. Mechanical Contractors Association of Kingston (Respondent) *(Withdrawn)*

**2081-10-U:** Terry Lumley (Applicant) v. C.U.P.E. (Respondent) v. Trillium Lakelands District School Board (Intervener) *(Withdrawn)*

**2215-10-U:** Richard Cichowski (Applicant) v. United Steelworkers of America Local 6571 (Respondent) v. Gerdau Ameristeel Inc. (Intervener) *(Withdrawn)*

**2234-10-U:** National Organized Workers (Applicant) v. ABC Group Product Development (Respondent) *(Withdrawn)*

**2250-10-U:** International Union of Operating Engineers, Local 772 (Applicant) v. Brookfield Properties (Respondent) *(Withdrawn)*

**2291-10-U:** Ontario Public Service Employees Union (Applicant) v. Geneva Centre for Autism (Respondent) *(Withdrawn)*

**2297-10-U:** Canadian Union of Public Employees (Applicant) v. Waste Services Inc. / BFI Canada Inc. (Respondent) *(Withdrawn)*

**2400-10-U:** United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Clover Tool Manufacturing Ltd. (Respondent) *(Withdrawn)*

**2418-10-U:** Scott Richard Gregory (Applicant) v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) Local 27 (Respondent) *(Withdrawn)*

**2444-10-U:** Power Workers' Union, C.U.P.E. Local 1000, C.L.C. (Applicant) v. Portlands Energy Centre (Respondent) *(Withdrawn)*

**2497-10-U:** Labourers' International Union of North America, Local 625 (Applicant) v. Trojan Interior Contracting (2002) Ltd. (Respondent) *(Terminated)*

**2523-10-U:** Anthony Stephenson (Applicant) v. Teamsters Local Union 938 (Respondent) v. United Parcel Service Canada Ltd. (Intervener) *(Withdrawn)*

**2531-10-U:** Calvin Reh (Applicant) v. Canadian Auto Workers Union, Local 1973 (Respondent) *(Withdrawn)*

**2548-10-U:** Calvin Reh (Applicant) v. Canadian Auto Workers Union, Local 1973 (Respondent) *(Withdrawn)*

**2552-10-U:** Ishaac Filali (Applicant) v. UNITE HERE (Respondent) *(Terminated)*

**2598-10-U:** Retail Wholesale and Department Store Union, District Council of the United Food and Commercial Workers' International Union (Applicant) v. Diamond Hotels Inc. o/a Days Inn Sault Ste. Marie (Respondent) *(Withdrawn)*

## APPLICATION FOR INTERIM ORDER

**2235-10-M:** National Organized Workers (Applicant) v. ABC Group Product Development (Respondent) *(Withdrawn)*

**2331-10-M:** Natalie Simmons-Malden (Applicant) v. Ontario Public Service Employees Union (OPSEU) (Respondent) *(Dismissed)*

**2399-10-M:** United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Clover Tool Manufacturing Ltd. (Respondent) *(Withdrawn)*

**2481-10-M:** Elementary Teachers' Federation of Ontario (Applicant) v. District School Board of Niagara (Respondent) v. Canadian Union of Public Employees and its Local 4156 (Intervener) *(Dismissed)*

## APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**2127-10-M:** Weston Bakeries Limited (Applicant) v. United Food and Commercial Workers Canada, Local 175 (Respondent) *(Granted)*

**2268-10-M:** Fortino's Supermarkets Ltd. and Fortino's Supermarket Inc. acting on behalf of Franchisees of Fortino's, United Food & Commercial Workers, Local 175 (Applicant) v. (Respondent) *(Granted)*

## JURISDICTIONAL DISPUTES

**0284-10-JD:** International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Areva NP Canada Inc., Canadian Union of Skilled Workers (Respondent) v. Electrical Power Systems Construction Association (Intervener) *(Withdrawn)*

**0916-10-JD:** International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Aker Construction Canada Ltd. and, Millwrights Regional Council of Ontario and its Local 2309 (Respondent) *(Dismissed)*

**1436-10-JD:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Sutherland Schultz Inc., Millwright Regional Council of Ontario and its Local 1007 (Respondent) *(Withdrawn)*

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**1947-10-M:** University of Western Ontario Police Association (Applicant) v. The University of Western Ontario (Respondent) v. Sergeant Stephen Dykeman, Sergeant Colleen Kelly, Sergeant Robert (Chuck) Decher and Sergeant Ryan Craig (Intervener) *(Withdrawn)*

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**2409-06-OH:** Ashagrie Getahun (Applicant) v. Extendicare (Canada) Inc. (c.o.b. Laurier Manor) (Respondent) *(Terminated)*

**1556-10-OH:** Christian Thantri (Applicant) v. Lush Manufacturing Ltd. (Respondent) *(Dismissed)*

**1653-10-OH:** Frank Conboy (Applicant) v. Municipality of Dysart (Respondent) *(Terminated)*

**1658-10-OH:** Elizabeth Simopoulos (Applicant) v. Avron Foods Ltd. (Respondent) *(Terminated)*

**1729- Z 0-OH:** Hifza Ali (Applicant) v. Insurance Brokers Association of Ontario (Respondent) *(Withdrawn)*

**1793-10-OH:** Patricia Dooley (Applicant) v. Ottawa Goodtime Centre (Respondent) *(Terminated)*

**1956-10-OH:** Shayla Christen (Applicant) v. Prime Restaurants Inc. (Respondent) *(Terminated)*

## CONSTRUCTION INDUSTRY GRIEVANCES

**4580-04-G:** Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc. (Respondent) *(Granted)*

**2921-07-G:** Local 7, International Union of Bricklayers & Allied Craftworkers (Applicant) v. GEM Campbell (Eastern) Inc. (Respondent) v. Terrazzo, Tile & Marble Guild of Ontario, Inc., The Brick and Allied Craft Union of Canada and the Ontario Provincial Conference, Masonry Industry Employers' Council of Ontario (Intervener) *(Withdrawn)*

**2257-09-G:** Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated Local Unions: 1007, 1151, 1244, 1410, 1592, 1916 and 2309 (Applicant) v. Trentfab Inc., Trentfab Industrial Contractors Inc., 2198430 Ontario Inc. and, Brian Kinmond (Respondent) *(Withdrawn)*

**2376-09-G:** International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Trentfab Inc., Trentfab Industrial Contractors Inc., 2198430 Ontario Inc. (Respondent) *(Withdrawn)*

**2479-09-G:** Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc. (Respondent) *(Withdrawn)*

**3657-09-G:** Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc. (Respondent) *(Dismissed)*

**3787-09-G:** United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting Industry of The United States and Canada, and its Local 67 (Applicant) v. Electrical Power Systems Construction Association and, E.S. Fox Ltd. (Respondent) *(Withdrawn)*

**3941-09-G:** Brick and Allied Craft Union of Canada, Local 10 (Applicant) v. Limen Masonry Limited, Limen Group Ltd., Limen Masonry (2003) Inc., Limen Enterprises (2003) Inc., Jomil Renovation Ltd. (formerly Acmar Masonry Inc.), Acmar Group Ltd. (Respondent) *(Withdrawn)*

**0382-10-G:** Canadian Union of Skilled Workers (Applicant) v. Hydro One Networks Inc. (Respondent) *(Granted)*

**1097-10-G:** Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc. (Respondent) *(Withdrawn)*

**1213-10-G:** International Union of Painters and Allied Trades, Local Union 1795, (Glaziers) (Applicant) v. 1440842 Ontario Inc. o/a KYIV Architectural Metals (Respondent) *(Endorsed Settlement)*

**1344-10-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 6665268 Canada Inc. o/a Absolute Installations and Prim Renovations Inc. (Respondent) *(Withdrawn)*

**1679-10-G:** Iron Workers District Council of Ontario, and its Local 765 (Applicant) v. Trentfab Inc. (Respondent) *(Withdrawn)*

**1777-10-G:** Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Roberto Mario Iaizzo c.o.b. as 6665268 Canada Inc. o/a Absolute Installations (a dissolved corporation and an unregistered business name) (Respondent) *(Endorsed Settlement)*

**1778-10-G:** Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Roberto Mario Iaizzo c.o.b. as 6665268 Canada Inc. o/a Absolute Installations (a dissolved corporation and an unregistered business name) (Respondent) *(Endorsed Settlement)*

**1797-10-G:** Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Triumph Trim Ltd. a.k.a. Triumph Trim & Hardwood Ltd. (Respondent) *(Dismissed)*

**1868-10-G:** Labourers' International Union of North America, Local 837 (Applicant) v. EMNM Concrete Contracting a division of 2196640 Ontario Inc.; 2196640 Ontario Inc. (Respondent) *(Granted)*

**1887-10-G:** Brick and Allied Craft Union of Canada, Local 1 (Applicant) v. Ellis-Don Limited (Respondent) *(Withdrawn)*

**1937-10-G:** Labourers' International Union of North America, Local 1081 (Applicant) v. EMNN Concrete Contracting a division of 2196640 Ontario Inc.; 2196640 Ontario Inc. (Respondent) *(Granted)*

**2013-10-G:** Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. 614128 Ontario Ltd. o/a Trisan Construction (Respondent) *(Withdrawn)*

**2021-10-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Metro Hoisting and Erecting Limited and Jason Leibeck (Respondent) *(Endorsed Settlement)*

**2039-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Discovery Electric Ontario Limited (Respondent) *(Endorsed Settlement)*

**2139-10-G:** International Association of Heat and Frost Insulators and Allied Workers, Local 95 (Applicant) v. Upper Canada Insulation Services Ltd. (Respondent) *(Granted)*

**2158-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Wasif Yousif c.o.b. as Khider Electromechanical (Respondent) *(Granted)*

**2172-10-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Terrastone Construction Inc. and Ron Colucci (Respondent) *(Endorsed Settlement)*

**2211-10-G:** Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Maxum Drywall Inc. (Respondent) *(Withdrawn)*

**2217-10-G:** United Association of Journeymen and Apprentices of the Plumbers and Pipefitters of the United States and Canada, Local 527 (Applicant) v. Comstock Canada Ltd. (Respondent) *(Withdrawn)*

**2238-10-G:** International Union of Painters and Allied Trades, Local 1819 (Glaziers) (Applicant) v. 1440842 Ontario Inc. o/a KYIV Architectural Metals (Respondent) *(Endorsed Settlement)*

**2295-10-G:** Labourers' International Union of North America, Local 1089 (Applicant) v. Clarkson Construction Company Limited (Respondent) *(Withdrawn)*

**2299-10-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. L82 Construction Ltd. (Respondent) *(Terminated)*

**2315-10-G:** Sheet Metal Workers' International Association, Local Union No. 285 (Applicant) v. Marvelle Mechanical Inc. (Respondent) *(Granted)*

**2320-10-G:** Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Edward C. Kosciuch c.o.b. as All City Drywall & Accoustics/All City Drywall and Acoustics Inc. (Respondent) *(Endorsed Settlement)*

**2325-10-G:** The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Restoration Environmental Contractors a Division of 836171 Ontario Inc. (Respondent) *(Withdrawn)*

**2350-10-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Korban Ltd. (formerly known as Korban (1997) Ltd.) (Respondent) *(Granted)*

**2355-10-G:** Sheet Metal Workers' International Association, Local 537 (Applicant) v. Medcon Mechanical Ltd. (Respondent) *(Granted)*

**2356-10-G:** Sheet Metal Workers' International Association, Local 537 (Applicant) v. Medcon Mechanical Ltd. (Respondent) *(Granted)*

**2375-10-G:** The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Total Contract Glazing Inc. (Respondent) *(Granted)*

**2391-10-G:** The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Peerless Finishing Contractors Ltd. (Respondent) *(Granted)*

**2406-10-G:** Brick and Allied Craft Union of Canada, Local 2 (Applicant) v. Stefcon Construction Inc. (Respondent) *(Withdrawn)*

**2412-10-G:** The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Ducan Ceiling & Walls Systems of Oshawa Limited (Respondent) *(Granted)*

**2424-10-G:** Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. CC Group Contracting Inc. (Respondent) *(Endorsed Settlement)*

**2454-10-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Trifield Construction Company Ltd. (Respondent) *(Granted)*

**2461-10-G:** The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. 1568278 Ontario Inc. o/a Basic Industries Glazing (Respondent) *(Withdrawn)*

**2484-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Lenwick Electric Inc. (Respondent) *(Granted)*

**2485-10-G:** Sheet Metal Workers' International Association, Local 537 (Applicant) v. 6886523 Canada Inc. c.o.b. as VIP Installations (Respondent) *(Granted)*

**2487-10-G:** The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Marcel Lebrun c.o.b. as AE Aaron Enterprises (Respondent) *(Granted)*

**2496-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Kevin Dickie Electric Inc. (Respondent) *(Endorsed Settlement)*

**2502-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ehrlich Electric Company (Respondent) *(Endorsed Settlement)*

**2503-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ehrlich Electric Company (Respondent) *(Endorsed Settlement)*

**2506-10-G:** The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Restoration Environmental Contractors, a division of 836171 Ontario Inc. (Respondent) *(Endorsed Settlement)*

**2537-10-G:** Labourers' International Union of North America, Local 625 (Applicant) v. J&J Lepera Infrastures Inc. (Respondent) *(Terminated)*

**2539-10-G:** Brick and Allied Craft Union of Canada and Brick and Allied Craft Union of Canada, Local 31 (Applicant) v. Moscone Tile Ltd. (Respondent) *(Withdrawn)*

**2544-10-G:** International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. Ross Contractors & Engineers Limited (Respondent) *(Withdrawn)*

**2572-10-G:** The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. 1440842 Ontario Inc. o/a Kyiv Architectural Metals (Respondent) *(Granted)*

**2579-10-G:** International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 & 736 (Applicant) v. Bulldog Rebar (Respondent) *(Granted)*

**2581-10-G:** International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Applicant) v. Trinity Reinforcing Steel Inc. (Respondent) *(Withdrawn)*

**2583-10-G:** The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. 1568278 Ontario Inc. o/a Basic Industries Glazing (Respondent) *(Granted)*

**2586-10-G:** International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. Carlesimo Steel Manufacturing (Respondent) *(Withdrawn)*

**2593-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Monopoli Electric Limited (Respondent) *(Granted)*

**2606-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. An-Dell Electric Limited (Respondent) *(Granted)*

**2608-10-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Tagus Electrical Contractors Inc. (Respondent) *(Granted)*

**2614-10-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 (Applicant) v. Aker Construction Canada Ltd. (Respondent) *(Withdrawn)*

**2623-10-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Concord Earthmoving Limited (Respondent) *(Granted)*

**2625-10-G:** The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. Brisson Painting (Ottawa) Inc. (Respondent) *(Granted)*

**2636-10-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Fortex Excavating Inc. (Respondent) *(Granted)*

**2637-10-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Mid North Excavating Ltd. (Respondent) *(Granted)*

## APPEALS - EMPLOYMENT STANDARDS ACT

**0089-09-ES:** Suzanne Harmouche (Applicant) v. Congregation Soeurs Antonines o/a Acad~mie Providence et, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0788-09-ES:** Buy Great Autos Ltd. (Cantel Marketing) (Applicant) v. Susan Buyna and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2499-09-ES:** Harpal Singh (Applicant) v. Rea International Inc. o/a Atlas Fluid Systems and, Director of Employment Standards (Respondent) *(Granted)*

**2558-09-ES:** Christna Singh (Applicant) v. 1415022 Ontario Limited o/a Postlinx Corporation a, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2634-09-ES:** Henk J. Dijong, a director of Trailmobile Canada Limited Estate 32-1151969 (Applicant) v. Yan Cao, Victor Cuellar and, Director of Employment Standards (Respondent) *(Granted)*

**2726-09-ES:** Andrew A. Santoloce, a Director of Trailmobile Canada Limited (Applicant) v. Yan Cao, Victor Cuellar and, Director of Employment Standards (Respondent) *(Granted)*

**2809-09-ES:** 1655453 Ontario Inc. faisant af faire sous le nom de Bizoux Bizoux (Applicant) v. Carole J. Charbonneau et, le directeur des normes d'emploi (Respondent) *(Granted)*

**2976-09-ES:** Esther Catacutan (Applicant) v. Elsie Papof f/Sherry Papoff Smither and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**3434-09-ES:** Diane Lund, a Director of Copper Ridge Restaurant Corp. (Applicant) v. Sasha Cyr and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**3435-09-ES:** Diane Lund, a Director of Copper Ridge Restaurant Corp. (Applicant) v. Lisa Clark and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**3436-09-ES:** Diane Lund, a Director of Copper Ridge Restaurant Corp. (Applicant) v. Meg Russell and, Director of Employment Standards (Respondent) *(Granted)*

**3440-09-ES:** R & B Automotive Inc. 580924 Ontario Inc. (Applicant) v. David Paton and, Director of Employment Standards (Respondent) *(Dismissed)*

**3652-09-ES:** Value Village Stores Inc. o/a Value Village (Applicant) v. Sonya R. Janess and, Di:rector of Employment Standards (Respondent) *(Endorsed Settlement)*

**3670-09-ES:** 1617041 Ontario Ltd. o/a Razmataz Coffee Bistro (Applicant) v. Sandra Kelly and, Director of Employment Standards (Respondent) *(Granted)*

**3952-09-ES:** Mervin L. Riddell Law Office (Applicant) v. Debora Boylen, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0092-10-ES:** Kairos Rehabilitation Program (Applicant) v. Jose Pacheco and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0223-10-ES:** Debora Boylen (Applicant) v. Mervin L. Riddell, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0273-10-ES:** Weihua (Marie) Shi (Applicant) v. Holcim (Canada) Inc. and, Director of Employment Standards (Respondent) *(Dismissed)*

**0290-10-ES:** James de Wet (Applicant) v. The Brick GP Ltd. and The Brick Furniture Warehouse (Brampton) Ltd., Director of Employment Standards (Respondent) *(Withdrawn)*

**0309-10-ES:** Bradley Wilson (Applicant) v. Kitchener Nissan (2009) Inc. o/a Paul Coffey Nissan, Director of Employment Standards (Respondent) *(Dismissed)*

**0312-10-ES:** Study English in Canada (Applicant) v. Malvina Berenshteyn and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0322-10-ES:** Amanda Hair Avenue Inc. (Applicant) v. Xingyu Chen and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0364-10-ES:** Tech Electronic Services Inc. (Applicant) v. Shawn Clarke and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0469-10-ES:** 2047812 Ontario Inc. o/a Rapid Resale (Applicant) v. Rocco DiVito and, Director of Employment Standards (Respondent) *(Dismissed)*

**0500-10-ES:** Ivaylo Bonev Penchev (Applicant) v. Moxie's Classic Grill and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0504-10-ES:** Sharon Halladay (Applicant) v. 1486676 Ontario Inc. o/a Fifth Wheel Truck Stop and, Director of Employment Standards (Respondent) *(Granted)*

**0510-10-ES:** 2150308 Ontario Inc. o/a Terry's Collision (Applicant) v. Dianne E. Lachapelle and, Director of Employment Standards (Respondent) *(Withdrawn)*

**0528-10-ES:** Study English in Canada (Applicant) v. Malvina Berenshteyn and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0571-10-ES:** Corporate Special Event Services Inc. (Applicant) v. Michel Ferron and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0586-10-ES:** J.K. Quality Welding Inc. (Applicant) v. James Cormier and, Director of Employment Standards (Respondent) *(Dismissed)*

**0589-10-ES:** Canadian Debt Recovery Ltd. (Applicant) v. Amara Landell and, Director of Employment Standards (Respondent) *(Granted)*

**0590-10-ES:** Canadian Debt Recovery Ltd. (Applicant) v. Kelly Vergucht and, Director of Employment Standards (Respondent) *(Granted)*

**0603-10-ES:** Robert J. Marciniw (Applicant) v. 1401295 Ontario Inc. o/a The Wilderness Group and, Director of Employment Standards (Respondent) *(Dismissed)*

**0628-10-ES:** iQor Canada Ltd. (Applicant) v. Laura Saunders and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0629-10-ES:** iQor Canada Ltd. (Applicant) v. Leo Leblanc and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0740-10-ES:** Jeffrey Kippel, Director of 1195286 Ontario Inc. (Applicant) v. Christine Killik and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0746-10-ES:** Fern Piche & Sons Limited (Applicant) v. Joy Morris and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0747-10-ES:** Fern Piche & Sons Limited (Applicant) v. Kenneth Bosselle and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0749-10-ES:** Ebenezer Hair Design Inc. o/a Paradiso Salon and Spa (Applicant) v. Nusrat Agha and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**0758-10-ES:** Ronald S. Nichie (Applicant) v. R. Denninger Limited and, Director of Employment Standards (Respondent) *(Dismissed)*

**0869-10-ES:** Dancing Blueberries & Desserts (Applicant) v. Nicole Benishek and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1028-10-ES:** Don Quait (Applicant) v. Landon Morgan Incorporated and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1034-10-ES:** Nancy Mercier o/a Nancy's Cafe (Applicant) v. Brenda Jobin and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1119-10-ES:** Bobby Bhar, a director of Children's Corner Day Nursery Inc. o/a Children's Corner Day Nursery (Applicant) v. Aimy Ayiravelil and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1170-10-ES:** Mark E. Hitchcock (Applicant) v. Auto-Pak Ltd. o/a Engines Extra and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1229-10-ES:** Shannon Lee (Applicant) v. Fine Touch Dental Management Corporation and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1247-10-ES:** Kevin Clark (Applicant) v. Flextronics Automotive Inc., Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1264-10-ES:** Jeffrey A. Saikaley, Contractor (Applicant) v. Director of Employment Standards (Respondent) *(Dismissed)*

**1299-10-ES:** Jeff Cousineau (Applicant) v. 1510610 Ontario Inc. o/a Central Welding & Iron Works and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1300-10-ES:** Patrick Byrne, a Director of Kingsway Arms Management (Carleton Place) Inc. (Applicant) v. Shelley Johnson and, Director of Employment Standards (Respondent) *(Withdrawn)*

**1330-10-ES:** 1131455 Ontario Inc. o/a Dixie Lee Restaurant (Applicant) v. Janet Snider and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1331-10-ES:** Guillermo Cuervo (Applicant) v. 2107525 Ontario Limited o/a Sapore's Ristorante & Bar and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1335-10-ES:** Lone Star Group of Companies Limited (Applicant) v. Erin Huard and, Director of Employment Standards (Respondent) *(Withdrawn)*

**1339-10-ES:** Ammar M. Shahzad (Applicant) v. The Staffing Edge Inc., Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1347-10-ES:** One Contact Canada Inc. (Applicant) v. Serge Narcisse Nkodo Oko and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1390-10-ES:** N-Able Technologies Inc. operating as N-Able Technologies (Applicant) v. Patrick Nadeau and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1395-10-ES:** In Touch Retirement Living Inc. (Applicant) v. Denise Ellis and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1463-10-ES:** Dimitri Shchegolev (Applicant) v. 2107525 Ontario Limited o/a Sapore's Ristorante & Bar and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1505-10-ES:** Carr's Delivery Service Incorporated o/a Carr's Delivery Service Inc. (Applicant) v. Joshua Pountney and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1518-10-ES:** Jessica Blackmore (Applicant) v. Thames Valley Children's Centre and, Director of Employment Standards (Respondent) *(Withdrawn)*

**1519-10-ES:** Jerry Piltzmaker, a director of Giant Carpet & Rugs Ltd. (Applicant) v. Tanveer M. Ahmad, Walid Alkhani, Cornwally Azarcon, Karen Clemas, Gary Coleman, Mehdi Fahidi, Michael Ferreira, Kenneth Grover, Marion Harris, Joseph Iskandar, Lenford Kelly, Bassam Khani, Akis Kokonakis, John D. Lucano, Stephen Mandel, Peter Matheson, Guy Paris, Maria Ranieri, Hermon Rezene, Mazen Sabsabi, Inderjit Singh, Konstantinos Sirillas, CelinaTran, E. Murray Westerberg and, Director of Employment Standards (Respondent) *(Dismissed)*

**1543-10-ES:** Cathy Copeland (Applicant) v. 1082601 Ontario Inc. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1580-10-ES:** 1202894 Ontario Inc. o/a Edward's Mazda (Applicant) v. Todd Tysick and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1586-10-ES:** Green All Landscaping Ltd. (Applicant) v. Michael Chvedukas and, Director of Employment Standards (Respondent) *(Terminated)*

**1614-10-ES:** Robsher Inc. o/a Pet Valu (Applicant) v. Krista Kremer and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1627-10-ES:** Tuyet Thi (Phong) Nguyen operating as Tuyet Thi Nguyen (Applicant) v. Virginia Velasquez and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1645-10-ES:** Grill It Up (FPM) Inc. (Applicant) v. Courtney Jackson and, Director of Employment Standards (Respondent) *(Terminated)*

**1714-10-ES:** Janet MacRae (Applicant) v. The Reid's Dairy Company Limited and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1724-10-ES:** Waste Management of Canada Corporation (Applicant) v. Colleen Green and, Director of Employment Standards (Respondent) *(Withdrawn)*

**1748-10-ES:** 1513271 Ontario Inc. o/a Sunchoice Produce (Applicant) v. Malcolm Jemmott and, Director of Employment Standards (Respondent) *(Terminated)*

**1859-10-ES:** 2188465 Ontario Ltd. o/a Max-Air Solutions (Applicant) v. Larysa Kramer and, Director of Employment Standards (Respondent) *(Terminated)*

**1890-10-ES:** Archana Jaiswal (Applicant) v. National Technology and Management Corp., Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**1902-10-ES:** Joseph Canisious (Applicant) v. Lakes Bar & Grill Inc. operating as Lakes Restaurant & Wine Bar and, Director of Employment Standards (Respondent) *(Terminated)*

**1959-10-ES:** Apollo Restaurant & Pizzeria Ltd. (Applicant) v. Sandra E. Fife and, Director of Employment Standards (Respondent) *(Terminated)*

**1988-10-ES:** 1606966 Ontario Limited o/a Scruffy Murphy's Irish Pub (Applicant) v. Fraser Mackenzie and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2116-10-ES:** Wensheng Wang (Applicant) v. Formglas Inc. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2128-10-ES:** 1513271 Ontario Inc. o/a Sunchoice Produce (Applicant) v. Kenneth Bullen and, Director of Employment Standards (Respondent) *(Terminated)*

**2129-10-ES:** 1513271 Ontario Inc. 0/a Sunchoice Produce (Applicant) v. Lone Fess and, Director of Employment Standards (Respondent) *(Terminated)*

**2130-10-ES:** 1513271 Ontario Inc. o/a Sunchoice Produce (Applicant) v. Daphine Bassindale and, Director of Employment Standards (Respondent) *(Terminated)*

**2240-10-ES:** Todd Omand (Applicant) v. Home Depot of Canada Inc. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2267-10-ES:** Pablo Spatzner (Applicant) v. 6239471 Canada Inc. 0/a Baton Rouge Restaurant and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2276-10-ES:** Safeena Khan (Applicant) v. 1444092 Ontario Inc. 0/A Monique's Collection Store, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2304-10-ES:** David Lowrey (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

**2305-10-ES:** Selection Fragrances SF1 Inc. o/a The Perfume Factory (Applicant) v. Gayle Hagen and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2341-10-ES:** Dennis Spotswood (Applicant) v. Cablevision Services and, Director of Employment Standards (Respondent) *(Terminated)*

**2378-10-ES:** 939935 Ontario Limited o/a Mandarin Markham (Applicant) v. Kam-Shing Chung and, Director of Employment Standards (Respondent) *(Terminated)*

**2380-10-ES:** R. Bros Electrical Group Inc. (Applicant) v. Brian Chester, Director of Employment Standards (Respondent) *(Terminated)*

**2381-10-ES:** 2216832 Ontario Inc. o/a Yanela Fashions Trading (Applicant) v. Amina Zaman and, Director of Employment Standards (Respondent) *(Terminated)*

**2386-10-ES:** Santa Maria Foods ULC operating as Santa Maria Foods Corporation (Applicant) v. Kenneth Sanderson and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

**2435-10-ES:** Dhushendran Ketheeswaranathan (Applicant) v. 1650352 Ontario Inc. o/a Yonge & Johnston Esso and, Director of Employment Standards (Respondent) *(Terminated)*

**2456-10-ES:** Marian Soare (Applicant) v. V.P.A. Group Inc. and, Director of Employment Standards (Respondent) *(Terminated)*

**2470-10-ES:** Nehemiah D. Thompson (Applicant) v. S&R International Inc., Racetrack Auto Centre o/a Tire Depot and, Director of Employment Standards (Respondent) *(Dismissed)*

**2533-10-ES:** Patrick J. Bulch (Applicant) v. Lyreco (Canada) Inc. and, Director of Employment Standards (Respondent) *(Terminated)*

**2549-10-ES:** Auto-Pak Ltd. o/a Engines Extra (Applicant) v. Mark E. Hitchcock and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

## APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

**3382-08-HS:** Hydro One Networks Inc. (Applicant) v. Labourers International Union of North America Local 183 and, Canadian Union of Skilled Workers and, Edward Wilson, Inspector (Respondent) *(Granted)*

**1314-09-HS:** Bruce Power (Applicant) v. Worker Co-Chair of Joint Health and Safety Committee, Power Workers' Union, Society of Energy Professionals and, Kevin Deneve, Inspector (Respondent) *(Withdrawn)*

**3390-09-HS:** Ontario Public Service Employees Union, Local 517 (Applicant) v. Her Majesty the Crown in Right of Ontario as Represented by the Ministry of Community Safety and Correctional Services and, Vivien Wharton-Szatan, Inspector (Respondent) *(Withdrawn)*

**1693-10-HS:** City of Toronto (Applicant) v. Canadian Union of Public Employees, Local 416 and, Jason Williams, Inspector (Respondent) *(Withdrawn)*

**2026-10-HS:** Fortis Properties Corporation (Applicant) v. Brian Toner, Inspector (Respondent) *(Withdrawn)*

**2253-10-HS:** Nexacor Realty Management Inc. (Applicant) v. Technicom Nord Ouest Inc., Ministry of Labour Mr. Marcel Labelle (Inspector) (Respondent) *(Granted)*

**2458-10-HS:** Reitmans (Canada) Limited (Applicant) v. Ministry of Labour (Respondent) *(Dismissed)*

## FIRST AGREEMENT - DIRECTION

**2468-10-FC:** Labourers' International Union of North America, Local 625 (Applicant) v. Solid Concrete (Respondent) *(Granted)*

## PAY EQUITY ACT

**1634-08-PE:** Corporation of the Municipality of Wawa (Applicant) v. Confidential Employee, Tracyann Marie MacNeill and, Karen Anne Wirtz (Respondent) *(Granted)*

**3072-09-PE:** Saydat Hospitality Inc., operating as Comfort Inn Motel (Welland) (Applicant) v. 2059419 Ontario Inc., Beverly Pottle, Lynda Raby, Rose Smith, Marion Fisher, Janice Reed, Barbara Kurica, Marija Raic, Amanda St. George (Culp), Elizabeth Dolomont, Hazel Scott (Respondent) *(Granted)*

**2388-10-PE:** Phung Kim Quach (Applicant) v. St. Christopher House, and, Canadian Union of Public Employees, Local 3393 (Respondent) *(Terminated)*

## PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

**3565-09-PS:** Ontario Public Service Employees Union (Applicant) v. Grand River Hospital;, St. Joseph's Health Care London;, CAW Canada; and, Ontario Nurses' Association (Respondent) *(Dismissed)*

Unit: "all paramedical employees of the Grand River Hospital employed in the City of Kitchener, save and except supervisors and co-ordinators, persons at or above the rank of supervisor and co-ordinator, students employed during the school vacation period, students on co-op work terms, interns, educators, clinical instructors and persons covered by subsisting collective agreements. For the purpose of clarity, PARAMEDICAL EMPLOYEE includes: AAC Tech, Biomedical Technologist, Child Life Specialist, Child Youth Worker, Communication Disorders Assistant, Dietician, Electronics Technologist, Genetics Counsellor, Kinesiologist, Lab Assistant, Morgue Attendant, Social Worker, Occupational Therapist, Pathologist Assistant, Physiotherapist, Physics Technician, Radiation Therapist, Recreation Therapist, Renal Technologist, Registered Respiratory Therapist, Registered Technician EEG, Registered Technician EKG, Registered Technician EMO, Registered Technician Lab, Registered Technician MI, Registered Technician MRI, Registered Technician Ultrasound, Senior Genetics Counsellor, Speech Language Pathologist, Social Work Assistant, Senior Electronic Technologist, Senior Medical Technologist, Senior Renal Technician, Senior Registered Technician MI, Senior Registered Technician Lab, Lead Pharmacy Technician, Pharmacy Assistant, Pharmacy Technician, Pharmacy systems Technician. For the purpose of clarity, SUPERVISOR includes: Charge Technologist, Team Lead and Professional Lead. For the purpose of clarity, PARAMEDICAL EMPLOYEE does not include: Advanced Practice Physiotherapist (APP), CPO-Cardio Pulmonary Technologist, Pharmacist, Psychological Associate, Psychologist, Physician, Wound Care Consultant, and Spiritual Care Provider." ( employees in unit)

| | |
|---|---|
| Number of persons on voters' list at start of vote | 473 |
| Number of persons who voted | 366 |
| Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list | 366 |
| Number of segregated ballots cast by persons whose names appear on voter's list | 0 |
| Number of segregated ballots cast by persons whose names do not appear on voters' list | 0 |
| Number of spoiled ballots | 1 |
| Number of ballots segregated and not counted | 0 |

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**2442-07-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. SNC-Lavalin Inc. (Respondent) *(Dismissed)*

**2936-07-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. SNC-Lavalin Inc., SNC-Lavalin Group Inc., SNC-Lavalin Power Ontario Inc. (Respondent) *(Dismissed)*

**0784-09-ES:** Jody Wells (Applicant) v. 1395153 Ontario Ltd. o/a Top Hat Home Comfort Services and, Director of Employment Standards (Respondent) *(Granted)*

**2275-09-ES:** Mario L. Loguisto (Applicant) v. Ottawa-Metro Towing and Recovery Inc., Director of Employment Standards (Respondent) *(Dismissed)*

**3786-09-ES:** Melodie S. Garcia (Applicant) v. Jane Saundercook and, Director of Employment Standards (Respondent) *(Dismissed)*

**0249-10-R:** Manufacturing, Transportation, and Allied Workers Union, Local 519, affiliated with Christian Labour Association of Canada (Applicant) v. Able Environmental Services Inc. (Respondent) v. Labourers' International Union of North America, Local 625 (Intervener) *(Granted)*

**0476-10-U:** Karen Egesi (Applicant) v. Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO) (Respondent) v. Crown in Right of Ontario (Intervener) *(Dismissed)*

**0478-10-U:** Karen Egesi (Applicant) v. Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO) (Respondent) v. Crown in Right of Ontario (Intervener) *(Dismissed)*

**1991-10-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Roni Excavating Limited and/or, 865217 Ontario Inc. o/a Iron Excavating and Grading and/or, Niro Bros. Excavating & Grading Inc. and/or, Iron Trio Inc. and/or, Orin Landscaping Inc. (Respondent) *(Dismissed)*

**1992-10-R:** The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. E McLachlan Enterprises (Lobo) Limited (Respondent) *(Dismissed)*

***Ontario Labour Relations Board,***
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***M5G 2P1***

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